Supreme Court, U.S.
FILED

NO. 97-86 JUL 14 1997

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In the
Supreme Court of the United States

OCTOBER TERM, 1997

ROBBIE A. VIATOR, DONIE R. HARMON, PAMELA S. BARBRY, RICHARD D. KEITH; PATRICIA DOUGLAS; ANGELA ROMERO; DONALD FONTENOT; GERALD LEE; ODELIA LOUISE TATE; DINA LOPEZ; NANCY H. BIMLE; MICHAEL JOSEPH TRAHAN; ANGELA R. LOPEZ; STEVEN PAUL JOHNSON; EVERETT PAUL MARSHALL; GARY CHESTER; KEVIN B. MATTE; CYNTHIA L. ROUGEAU; DAVID LEE PATTON; BRADLEY FONTENOT: TRACY BARNES: FRANK BERLIN: AND KATHLEEN CRICH
Individually and on behalf of all persons similarly situated
Petitioners

V.

DELCHAMPS, INCORPORATED
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Whether the regulations promulgated pursuant to the Worker Adjustment and Retraining Notification Act ("WARN") have been arbitrarily interpreted to deny relief to workers who are employed at facilities within reasonable geographic proximity of one another and serving the same operational purpose on the basis that the employees and equipment were not regularly shared among facilities.

PARTIES TO THE PROCEEDING

The petitioners are Robbie A. Viator, Donie R. Harmon, Pamela S. Barbry, Richard D. Keith; Patricia Douglas; Angela Romero; Donald Fontenot; Gerald Lee; Odelia Louise Tate; Dina Lopez; Nancy H. Bimle; Michael Joseph Trahan; Angela R. Lopez; Steven Paul Johnson; Everett Paul Marshall; Gary Chester; Kevin B. Matte; Cynthia L. Rougeau; David Lee Patton; Bradley Fontenot; Tracy Barnes; Frank Berlin; and Kathleen Crich, individually and on behalf of all persons similarly situated.

The respondent is Delchamps, Incorporated

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the decision of the Fifth Circuit, Court of Appeal, entered on April 15, 1997.

OPINIONS BELOW

The opinion of the Court of Appeal (App. 21-32) is not yet reported. The opinions and orders of the Western District of Louisiana, Lake Charles Division (App. 1-15) are unreported.

JURISDICTION

The opinion of which petitioners seek review was issued April 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS AND REGULATIONS

The provisions of the Worker Adjustment and Retraining Notification Act ("WARN") 29 U.S.C. § 2101 et seq. are reprinted at App. 33-46. 20 C.F.R. § 639 et seq. are reprinted at App. 47-74.

STATEMENT OF THE CASE

This suit was instituted by plaintiffs against Delchamps, Inc. alleging that between February 25, 1995 and February 27, 1995, Delchamps, Inc. terminated plaintiffs and other employees without the notice required by the Worker Adjustment and Retraining Notification Act ("WARN") 29 U.S.C. § 2101 et seq., where an employer employs collectively fifty or more employees at facilities within a single site of employment. Plaintiffs filed this suit in their individual capacities and as representatives of all persons similarly situated. Delchamps, Inc. conceded that the three stores in the Lake Charles area collectively had over fifty employees and that it did not give sixty days prior written notice to its employees as required by the WARN Act, but contended it was not required to do so.

On February 22, 1996, the Court issued a minute entry stating it would consider summary judgment *sua sponte* since the essential question was one of law as to whether the three Delchamps stores in the greater Lake Charles area, each employing fewer than fifty employees, but collectively more than fifty constituted a "single site of employment" so as to meet a threshold requirement for WARN application. (App. 1-3). On July 2, 1996, the Magistrate Judge issued a report and recommendation accepted by the District Judge, opining that the three store facilities in the greater Lake Charles area were three separate sites even though the facilities were in close geographic proximity and shared the same operational purpose. (App. 4-15). On April 15, 1997, the United States, Fifth Circuit, Court of Appeal affirmed the District Court ruling, holding that the Department of Labor regulations required a "regular" sharing of staff and

equipment. (App. 21-46).

The facts of the case reveal a close relationship among the three stores in the Lake Charles area. All three stores opened at about the same time, were exactly the same size, and were close to one another. On January 16, 1984, Delchamps, Inc. leased two buildings containing 33,387 square feet each in the greater Lake Charles area. (Stores No. 104 and 106). On April 17, 1984, Delchamps, Inc., leased a third store in the greater Lake Charles area consisting of same square footage. (Store No. 105). Store no. 104 and store no. 105 were located 5.4 road miles apart. Store no. 104 and store no. 106 were located 9.4 road miles apart. Store no. 105 and store no. 106 were located 12 road miles apart. (App. 164-166; 24-25).

When the three facilities first opened, Delchamps, Inc. launched a six month coordinated advertising campaign in the local paper, The Lake Charles American Press, publicizing all three of the stores. (App. 148; 25). Just as all three stores opened at about the same time, all three stores closed between February 25th and February 27th of 1995. (App. 101, 150).

As to the management of the stores, prior to closing, one District Manager, Mr. Wayne Wiggins, exercised "continuous, direct supervision of day-to-day store operations" at all three of these stores as well as others. From November 1994 through February 27, 1995 all three stores were managed by a single manager, Bryan Bradley, rather than each store having a separate store manager. (App. 157-158; 144; 164-165).

From the record, the fact finder may infer that one of the

major business considerations of Delchamps in locating the three stores in close proximity of each other was to allow Delchamps to blend its more experienced and skilled workers with newer untrained employees to assure that the work was properly performed, maximizing the efficiency of its total operation in the Lake Charles area. (See Addendum A and B). Also, full-time personnel employed could be (and were) shifted among the three stores in the Lake Charles area, as employees became sick, went on vacation or holidays, or left employment with Delchamps. (App. 134-135). Similarly, part-time employees were also allowed to supplement hours by filling the personnel needs of other stores in the greater Lake Charles area. (App. 132).

Managerial staff was transferred among the facilities to identify who was responsible for excessive shrinkage, that is, the difference between merchandise delivered and merchandise sold as controlling shrinkage was one of Delchamps' principal concerns. (App. 130; 139-142).

The three stores also shared supplies, merchandise and equipment. While equipment was shared among the three stores only occasionally, borrowing of supplies ranged from occasional to often and merchandise was transferred among the three facilities to alleviate shortages and reduce overages arising when one store ordered too little of an item and another ordered too much on a regular basis. (App. 137-138).

The operational dependence of the three stores was further evidenced by the financial interrelationship of the three stores. In the calendar year prior to closing, 1994, Delchamps hoped that Store No. 104 would generate gross sales of $5,316,000 in 1994. (App. 107). The annualized

1994 sales amounted to $5,304,000, $12,000 below its goal. (App. 107). However, Delchamps had budgeted $607,365 for Store No. 104, and annualized expenses amounted only to $572,364; therefore, Store No. 104 actually exceeded Delchamps' goal, (App. 109). Store no. 106 was also profitable in 1994. (App. 119). Projected gross sales in 1994 were $6,911,000. Annualized 1994 sales amounted to $6,552,000, a shortfall of $359,000, for which store no. 106 compensated by reducing expenses $43,994.00. (App. 121). Only Store No. 105 was unprofitable in 1994, missing projected gross sales by $1,352,000. (App. 113). It may be readily inferred that all three stores were closed because store no 105 was not profitable.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Presents An Important Question of Federal Law That Has Not Been, But Should Be, Settled By This Court

In a recent opinion, Justice Scalia writes that the ". . .last redoubt of losing causes. . . [is] . . .the proposition that the statute at hand should be liberally construed to achieve its purposes." *Director, Office of Worker's Comp. v. Newport News,* 115 S.Ct. 1278 (1995). With all due candor to this Honorable Court, petitioners admit that this case appears, but only at first blush, to present such a cause brought under the Worker's Adjustment Notification and Retraining ("WARN") Act. 29 U.S.C. § 2101 et seq. Petitioners respectfully submit that the opinion below represents the third

appeals court[1] to address WARN that has gone beyond the principle of deference afforded administrative interpretations enunciated by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), by disregarding the reasonableness requirement of regulatory interpretation. The trend developing in the judicial decisions is to interpret WARN in a manner which affords protection to some workers, their families, and communities while arbitrarily denying the same relief to others. Petitioners respectfully submit that since the Eleventh Circuit, Eighth Circuit and Fifth Circuit have spoken to the issue of what constitutes a single site of employment, and a case is pending, at district level[2], in the Third Circuit, on that same issue, the time is appropriate for this Court to address the ambiguity in the Department of Labor regulations relating to the issue of "single site of employment", and consider whether the present interpretation of same conflicts with this Court's rquirement that agency regulations be given controlling weight ". . .unless they are arbitrary, capricious, or manifestly contrary to the statute" pursuant to which the regulations were adopted. *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782, 81 L.Ed. 2d 694.

The Worker Adjustment Notification and Retraining (WARN) Act mandates that employers of more than 100 persons provide a minimum of sixty (60) days written notice before "the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating

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[1] *Viator v. Delchamps*, ____ F.3d ____ (5th Cir. 1997); *Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277 (8th Cir. 1996); *International Union, UMW v. Jim Walter Resources*, 6 F.3d 722 (11th Cir. 1993).

[2] *Butler v. Giant Markets, Inc.*, 1997 WL 177576 (M.D.Pa.)

units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees." 29 U.S.C. § 2101 (a) (2).

The term "single site of employment" was substituted for the phrase initially proposed, namely, "place of employment" *H. R. Rep. No. 100-576, 100th Congress, Pub. L. 100-418 (1988).* Congress, however, stopped short of defining "single site of employment" and instead conferred authority upon the Secretary of Labor to promulgate regulations, including interpretive regulations, necessary to implement the purpose of WARN. 29 U.S.C. § 2107.

The promulgated regulations, 20 C.F.R. § 639.1 et seq., provide as follows:

"§ 639.3 **Definitions**:

(i) *Single Site of Employment*; (1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(3) **Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment.** An example is an

employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another

(4) Non-contiguous sites in the same geographic area which do not share **the same staff or operational purpose** should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.

(5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment.

* * *

(8) The term 'single site' of employment may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not acceptable." 20 C.F.R. § 639.3 (i) [Emphasis added]

After considering the regulations and case law, the Fifth Circuit, Court of Appeal held in the present case:

"[S]eparate facilities are only to be treated as a single site of employment if all three factors identified in the regulations are met, namely; (1) the separate facilities are in

> 'reasonable geographic proximity' of one another; (2) they are 'used for the same purpose'; (3) and they 'share the same staff and equipment' 20 C.F.R. § 639.3 (i) (3). Any other reading would be inconsistent with the plain language of the regulation." [App. 28-29].

The Court further elaborated that facilities must "regularly" share staff and equipment to constitute a single site of employment. (App. 31). Petitioners respectfully disagree with the lower Court's interpretation of the regulations as requiring sharing of the same employees and equipment among facilities and that such sharing be "regular," particularly where the other two factors [(1) and (2) above] militate strongly toward finding a single site of employment. The lower court's interpretation raises a question which has not been addressed by any court to date, that is, the meaning of the curious "or" set forth in 20 C.F.R. § 639.3. (i) (4).

Under the lower Court's interpretation this subsection would read:

> "Non-contiguous sites in the same geographic area which do not share the same staff **and** operational purpose should not be considered a single site." [Emphasis added]

This is not, however, the regulation which the Department of Labor adopted. 20 C.F.R. § 639.3 (i) (4) provides:

> "Non-contiguous sites in the geographic area which do not share the same staff **or** operational purpose should not be considered a single site." [Emphasis added]

The only reasonable manner in which § 639.3 (i) (3) and § 639.3 (i) (4) may be reconciled is to require one, but not both, of these other factors. To conclude otherwise would arbitrarily distinguish between grocery workers employed at one superstore in a community, and grocery workers employed at separate store facilities throughout that same community.

The basic tenets of statutory construction are generally applied when courts construe an administrative regulation. *Nebraska Pharmacists v. Dept. of Social Services,*, 863 F.Supp. 1037 (D.Neb. 1994). Terms connected by the disjunctive, "or", are normally read to have separate meanings and significance. *United States v. K. Behnezhad,* 907 F.2d 896 (9th Cir. 1990). The lower Court's interpretation fails to reconcile § 639.3 (i) (3) with § 639.3 (i) (4) and renders the latter provision superfluous.[3]

Petitioners respectfully submit that any reconciliation of the ambiguity between § 639.3 (i) (3) and § 639.3 (i) (4) must be done in accordance with the *Chevron* guidelines. Under *Chevron,* the lower court's interpretation need not be the best interpretation, but must be reasonable—one that does not result in arbitrary distinctions.

In addressing whether the lower court's interpretation is arbitrary, the purpose for which WARN was enacted must be considered. The purpose of the WARN Act set forth in

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[3] In *Forsyth v. Barr,* 19 F.3d 1527, 1543 (5th Cir. 1994), the Court states, ". . .a maxim of statutory construction precludes one part being read so as to render another superfluous." *cert. denied,* 115 S.Ct. 195, 130 L.Ed. 2d 127. "The task of the judiciary is ' . . .to interpret the regulation as a whole, in light of the overall statutory and regulatory scheme, and not to give force to one phrase in isolation." *Campesinos Unidos v. United States Dept. of Labor,* 803 F.2d 1063, 1069 (9th Cir. 1986).

the preamble[4] of the regulations is as follows:

> **§ 639.1 Purpose and Scope**
>
> (a) Purpose of *WARN*
>
> **The Worker Adjustment and Retraining Notification Act (WARN or the Act) provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closing and mass layoffs.** Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated workers so that dislocated worker assistance can be promptly provided. [Emphasis added]

In light of this purpose, it is reasonable to interpret WARN as requiring that separate facilities be in reasonable geographic proximity. The WARN Act is intended to protect not only workers and their families, but communities. The essential nature of this element is emphasizd by the regulations which make reference to the geographic requirement

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[4] It is axiomatic that a court may consult the preamble, accompanying a regulatory enactment, as a source of interpretation. *Martin v. OSHRC*, 941 F.2d 1051 (10th Cir. 1991); *Martin v. American Cyanamid Co.*, 5 F.3d 140 (6th Cir. 1993).

in both § 639.3 (i) (3) amd (4). It is also reasonable to require that the separate facilities share either 1) the same staff and equipment or 2) the same operational purpose so that one employer who is engaged in a number of **different** enterprises in a community is not arbitrarily required to comply with an Act that would not apply if those businesses were operated by separate employers in that community. However, to require that facilities share both staff and equipment and they share the same operational purpose before WARN is triggered raises form above substance and discounts the critical requirment voiced by the Department of Labor after the regulations were promulgated, namely, whether the separate facilities share an "inextricable operational connection" that would warrant treatment of geographically remote workplaces as a single site of employment. 54 F.R. 16042, 16049 (1989). The Depatment of Labor states:

> "In developing these final regulations, DOL has attempted to faithfully follow the language and intent of WARN. The Department also has been aware that some of the provisions of WARN may be ambiguous. In an effort to assist the public in avoiding unintentional noncompliance, DOL has tried to point out potential problems and in some cases has suggested methods of compliance. 54 F.R. at 16043.
>
> * * *
>
> Section 639.3 (i) Definition of 'Single Site of Employment'
>
> This section provides a definition of 'single site of employment' which is drawn from the April 1988 Conference Report on H.R. 3. (H.R. Rep

100-576, 100th Cong., 2nd Sess., 1046 (April 20, 1988)). **As a general rule, a geographic connection or proximity is required to define 'single site of employment.'** Even where several distinct operations are performed at a geographically connected site, that building or complex will be counted as a single site of employment. **The regulations also recognize that, in some limited cases, geographically separate sites may still be considered a single site of employment because of an inextricable operational connection.** DOL intends this exception to be a narrow one to cover those cases where separate buildings are used for the same purpose and share the same staff and equipment.

Several commenters expressed concerns that the definition of single site of employment could be read either too broadly or too narrowly. Two commenters were concerned that the discussion of geographically separate but operationally connected sites in § 639.3 (i) (2) could be read broadly to cover separate sites which occasionally share staff or which are supplied from a common source. As noted above, this exception is intended to be read narrowly to cover those rare situations in which two separate buildings share staff, equipment and functions. DOL believes that the language of the exception conveys this narrow reading." 54 F.R. at 16049.

Petitioners submit that § 639.3 (i) (3) and § 639.3 (i) (4) are reconcilable if § 369.3 (i) (3) is interpreted as illustrative of when, as a matter of law, a "single site of employment"

is established. The Department of Labor also established, however, a minimum threshold level below which an employer need not be concerned about WARN by drafting the language of § 639.3 (i) (4).

The present case falls squarely in the interstices, and the guidance offered by the Department of Labor 54 F.R. 16042, for addressing the ambiguity offers a rational "inextricable operational connection" test which has been arbitrarily limited to instances of regular sharing of staff and equipment.

Such interpretation affords protection to a community with one superstore employing fifty employees, and arbitrarily denies protection to that same community when three grocery stores employing 147 (49 employees per store) employees are closed. Congress entrusted the judiciary with the duty of enforcing WARN. Judicial deference to the administrative agency that promulgated the regulations is due, but only to an extent. The lower court decision is arbitrary.

As a remedial statute, the WARN Act "must be construed broadly" to effectuate its purpose. *Solberg v. Inline Corp.*, 740 F.Supp. 680, 685 (D.Minn. 1990), citing *Belland v. Pension Benefit Guar. Corp.*, 726 F.2d 839, 844 (D.C.Cir.), cert. denied 469 U.S. 880, 105 S.Ct. 245, 83 L.Ed. 2d 183 (1984); *Washington v. Aircap Industries Corp.*, 831 F.Supp. 1292 (D.S.C. 1993).

The factors considered by the courts in determining whether separate work places constitute a single site of employment are all related to one central question, namely, whether there is ". . .a sufficient degree of geographic

contiguity as well as an operational connection." *International Union, U.M.W. v. Jim Walter Resources,* 6 F.3d 722, quoting *9A Ind. Empl. Rights Man.* (BNA) 595:954 (1988). The intention of the Department of Labor was that there be some "inextricable connection" warranting treatment as a single site, and while the "regular" sharing of staff and equipment is illustrative of such connection, petitioners submit that it is merely illustrative. Such connection may also exist, as in the present case, where facilities in reasonable geographic proximity share the same operational purpose even absent a sharing of staff or equipment, or alternatively, even absent a "regular" sharing of staff and equipment.

CONCLUSION

Congress enacted the Worker Adjustment Notification and Retraining (WARN) Act, 29 U.S.C. § 2101, et. seq. to provide protection to workers, their families and communities by requiring employers to provide notification sixty days before a shutdown of one or more facilities within a single site of employment. Congress conferred the power upon the Department of Labor to prescribe regulations necessary to implement this law. 29 U.S.C. § 2107. The promulgated regulations state that non-contiguous sites in the same geographic area which do not share the same staff "or" operational purpose should not be considered a single site. 20 C.F.R. § 639.3 (i) (4). In the instant case, where the lower court has expressly found that three stores in the greater Lake Charles area were not only in the same geographic area, but also shared the same operational purpose, it was error to conclude, as a matter of law, that the facilities were not

within a single site of employment. To interpret the Department of Labor regulations as requiring an inextricable operational connection for separate facilities to constitute a single site of employment is reasonable, but to interpret those regulations as requiring that the inextricable operational connection take the form of a regular sharing of the same employees and equipment where the facilities share the same opertional purpose is arbitrary and inconsistent with the opinion of this Court in the *Chevron* case.

For the foregoing reasons, petitioners respectfully urge that this petition for a writ of certiorri be granted.

Respectfully submitted:

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July 11, 1997

ADDENDUM A

Employee	Earnings	Date of Hire	Department/Title	Stores Worked
(1) Julius Courville, Jr.	Salaried	02/19/85	Market Manager	105, 104
(2) Frank E. Berlin	$14.05	09/28/87	Market	104,105,106,105
(3) Bradley Fontenot	$10.80	12/16/84	Market	106,105,104,106
(4) Kevin B. Matte	$14.05	05/17/85	Market	105,104
(5) David L. Patton	$10.00	06/15/92	Market	104,106
(6) Wesley A. Schirmer	Salaried	03/17/86	Market	105,106,105,104, 105,106,105
(7) Mark L. Schultz	$14.05	01/25/91	Market	105,106

ADDENDUM A (continued)

Employee	Earnings	Date of Hire	Department/Title	Stores Worked
(8) Steven P. Johnson	$11.30	04/15/91	Produce Manager	104,105,106
(9) Donald J. Fontenot	$12.35	04/07/86	Produce Manager	105,104
(10) Gary A. Chester	$10.80	09/20/85	Produce	105,106
(11) Nancy Bimle	$12.55	07/30/84	Deli/Bakery	104,105,104,106
(12) Sharlene R. Hart	$10.80	08/01/88	Deli/Bakery	104,105
(13) Dina E. Lopez	$11.95	01/06/86	Deli/Bakery	104,106,104,105
(14) Angela F. Romero	$12.55	10/30/85	Deli/Bakery	105,104
(15) Cynthia L. Rogeau	$10.80	09/24/84	Deli/Bakery	104,105

ADDENDUM A (continued)

Employee	Earnings	Date of Hire	Department/Title	Stores Worked
16) Anita A. Quibodeaux	$10.80	09/04/84	Health/Beauty	104,106
(17) Therman T. Black	$ 9.90	12/02/90	Grocery	105,104
(18) Donie R. Harmon	$10.80	03/15/85	Grocery	105,104
(19) Paul James, III	$11.95	06/15/85	Grocery	105,106,105
(20) Gerald W. Lee	$10.80	08/07/85	Grocery	105,104
(21) Earl Thompson, Jr.	$10.80	05/25/87	Grocery	105,104
(22) Sandra F. Chapman	$10.80	03/25/85	Checkout	106,105
(23) Kenneth W. Clark	$10.80	10/02/84	Checkout	104,106

ADDENDUM A (continued)

Employee	Earnings	Date of Hire	Department/Title	Stores Worked
(24) Dabrina D. Cole	$10.80	10/05/89	Checkout	106,104
(25) Kirkland J. Nevills	$ 4.40	11/13/94	Checkout	105,104
(26) Randall G. Martens	Salaried	08/07/89	Assst. manager	106,104,105
(27) Bryan M. Bradley	Salaried	12/17/84	Store manager	104,106,105,106, 104,105,106, and all three stores simultaneously

ADDENDUM B

Employee	Earnings	Date of Hire	Department/Title	Stores Worked
(1) Derek M. Courville	$ 5.00	10/17/94	Market	105
(2) Kenneth R. Cole	Salaried	08/05/91	Market	106
(3) Vickie H. Pousson	$11.30	02/14/85	Produce	105
(4) Cynthia D. Soileau	$ 4.50	07/11/94	Deli/Bakery	105
(5) Debra A. Chapman	$ 4.50	06/06/94	Deli/Bakery	106
(6) Angela R. Lopez	$ 4.65	01/16/94	Deli/Bakery	106
(7) Steven M. Davis	$ 5.05	07/29/91	Deli/Bakery	104
(8) Patina Hardy	$ 5.30	05/18/92	Deli/Bakery	104

ADDENDUM B (continued)

Employee	Earnings	Date of Hire	Department/Title	Stores Worked
(9) Sherry L. Carnahan	$ 5.55	04/29/91	Deli/Bakery	104
(10) Barbara J. Gobert	$ 5.55	04/29/91	Deli/Bakery	106
(11) Tina M. Thibodeaux	$ 7.60	12/10/90	Deli/Bakery	104
(12) Patricia A. Douglas	$ 9.40	07/08/90	Deli/Bakery	106
(13) Gertrude Cummings	$10.80	03/20/85	Deli/Bakery	105
(14) Timothy N. Bible	$ 4.50	09/04/94	Grocery	104
(15) Mark L. McGee	$ 4.50	07/10/94	Grocery	104
(16) Jeremy G. Brown	$ 4.50	01/15/95	Grocery	105

ADDENDUM B (continued)

Employee	Earnings	Date of Hire	Department/Title	Stores Worked
(17) Jearith M. Lee	$ 4.50	10/02/94	Grocery	106
(18) Eric C. Sens	$ 4.65	01/05/94	Grocery	104
(19) Wayne E. Stone	$ 5.05	03/01/92	Grocery	106
(20) James S. Leleux	$ 5.30	07/28/91	Grocery	106
(21) Martin A. Guillory, Jr.	$ 6.10	05/22/90	Grocery	105
(22) David G. Adams	$10.25	03/13/90	Grocery	105
(23) Robbie A. Viator	$10.80	02/11/85	Grocery	105

ADDENDUM B (continued)

Employee	Earnings	Date of Hire	Department/Title	Stores Worked
(24) John M. Malveau	$10.80	06/22/89	Grocery	105
(25) Cindy M. Vincent	$10.80	12/27/84	Grocery	106
(26) Richard D. Keith	$11.94	09/06/87	Grocery	106
(27) George E. Ashley	$ 4.50	06/01/94	Checkout	104
(28) Letha A. Keyes	$ 4.50	10/06/93	Checkout	104
(29) Marzetta D. Landry	$ 4.50	12/26/94	Checkout	104
(30) Marc J. Clarke	$ 4.50	09/06/94	Checkout	104
(31) Sabrina M. Cooper	$ 4.50	09/12/94	Checkout	104

ADDENDUM B (continued)

Employee	Earnings	Date of Hire	Department/Title	Stores Worked
(32) Monica S. Gripp	$ 4.50	07/13/94	Checkout	105
(33) Kimberly Y. Semien	$ 4.50	07/11/94	Checkout	105
(34) Joseph E. Clements	$ 4.50	10/30/94	Checkout	106
(35) Allison L. Savoie	$ 4.65	04/26/93	Checkout	104
(36) Melissa J. Brittain	$ 4.65	10/11/93	Checkout	104
(37) Amy R. Richard	$ 4.65	11/04/93	Checkout	104
(38) Elsie M. Fuselier	$ 4.65	09/13/93	Checkout	105
(39) Doris S. Ardoin	$ 4.65	10/31/93	Checkout	105

ADDENDUM B (continued)

Employee	Earnings	Date of Hire	Department/Title	Stores Worked
(40) Frances J. Horner	$ 4.65	12/27/93	Checkout	105
(41) Trudi L. Strahan	$ 4.65	11/28/93	Checkout	106
(42) Stephanie H. Clement	$ 4.80	11/11/92	Checkout	104
(43) Rebecca E. Ash	$ 5.05	01/20/93	Checkout	105
(44) Kristi M. Pettifield	$ 5.05	12/14/92	Checkout	105
(45) Jill A. LeBlanc	$10.25	03/19/90	Checkout	106
(46 Gail L. Reimer	$10.40	12/04/89	Checkout	105

ADDENDUM B (continued)

Employee	Earnings	Date of Hire	Department/Title	Stores Worked
(47) Odelia L. Tate	$10.80	01/19/87	Checkout	104
(48) Melissa Kelley	$10.80	06/11/87	Checkout	104
(49) Tabetha A. Stutes	$11.40	10/07/87	Checkout	106
(50) Kathleen K. Crick	$10.80	01/08/90	Floral	104
(51) Ida M. Robicheaux	$10.80	09/03/86	Floral	105
(52) Gloria A. Cleaton	$ 6.25	04/26/93	Floral	106
(53) Tracy M. Barnes	$ 5.80	06/12/89	Seafood	105

(2)

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NO.

OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1997

ROBBIE A. VIATOR, DONIE R. HARMON, PAMELA S. BARBRY, RICHARD D. KEITH; PATRICIA DOUGLAS; ANGELA ROMERO; DONALD FONTENOT; GERALD LEE; ODELIA LOUISE TATE; DINA LOPEZ; NANCY H. BIMLE; MICHAEL JOSEPH TRAHAN; ANGELA R. LOPEZ; STEVEN PAUL JOHNSON; EVERETT PAUL MARSHALL; GARY CHESTER; KEVIN B. MATTE; CYNTHIA L. ROUGEAU; DAVID LEE PATTON; BRADLEY FONTENOT: TRACY BARNES: FRANK BERLIN: AND KATHLEEN CRICH
Individually and on behalf of all persons similarly situated
Petitioners

V.

DELCHAMPS, INCORPORATED
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX VOLUME I

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APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

ROBBIE A. VIATOR, ET AL	:	DOCKET NO.95 CV 0797 LC
VERSUS	:	JUDGE TRIMBLE
DELCHAMPS, INC.	:	MAGISTRATE JUDGE WILSON

FILED
FEB 22 1996

MINUTE ENTRY

A telephone status conference was held this date with councel for all parties participating. This is a suit under the Worker Adjustment and Retraining Notificatiaon Act (WARN Act), 29 U.S.C. § 2101 *et seq.* It arises out of the closing of three of the defendant's stores in the Calcasieu Parish area. All parties agree that there is no viable claim under the WARN Act unless 50 or more employees suffered an employment loss at a single site of employment. *See* 29 U.S.C. §2101(a)(2); 20 C.F.R. § 639.3((b). The parties further agree that this threshold of 50 employees is not reached in this case unless all three stores are considered a "single site of employment." *See* 20 C.F.R. § 639.3(1). The question of whether the

three stores at issue constitute a "single site" under the WARN Act is a mixed question of law and fact. *Carpenters Dist. Council v. Dillard Dept. Stores,* 15 F.3d 1275, 1289 (5th Cir. 1994), *cert. denied,* 115 S.Ct. 933 (1995); *Williams v. Phillips Petroleum Co.,* 23 F.3d 930, 934 (5th Cir. 1994), *cert. denied,* 115 S.Ct. 582 (1994). Whether multiple locations constitute a "single site" under the WARN Act is a legal conclusion to be drawn from the underlying historical facts. *Id.* After hearing the arguments of counsel it appears that there may not be a genuine issue of underlying historical fact material to whether the three stores were a "single site" under the WARN Act. Counsel argeed that summary judgment should be considered on this issue before the motion for class certification was submitted. Accordingly, this court will consider granting a *sua sponte* summary judgment on the issue of whether the three stores should be considered as a "single site" under the WARN Act. The plaintiffs bear the burden of proof on this issue and, therefore, must come forward with competent summary judgment evidence probative of facts that could support a finding in their favor on the "single site" issue. Plaintiffs will have until April 22, 1996, to file their summary judgment evidence and a brief. Defendant will have until May 7, 1996, to respond. Plaintiffs will then have until May 17, 1996, within which to respond to defendant's submission. Thereafter, the undersigned will file a report and recommendation to the district judge.

The hearing on class certification presently set for February 29, 1996, is upset and refixed for June 10, 1996. No argument will be heard unless ordered by the court. The parties agree that the motion for class certification will be decided on the basis of the record, including timely filed briefs and any supporting or opposing documents filed therewith.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 22d day of February, 1996.

/s/ Alonzo P. Wilson

ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

ROBBIE A. VIATOR, *et al.*	:	CIVIL ACTION
VERSUS	:	NUMBER 95-0797
DELCHAMPS, INC.	:	JUDGE TRIMBLE MAGISTRATE JUDGE WILSON

FILED
JUL 01 1996

REPORT AND RECOMMENDATION

This suit is brought under the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. § 2101, *et seq.* The plaintiffs are all former employees of three Calcasieu Parish stores owned and operated by Delchamps, Inc. ("Delchamps"). Between February 25, 1995 and February 27, 1995, Delchamps closed all three Calcasieu Parish stores. At that time, all area employees were severed. The employees did not receive sixty days notice prior to the store closings as contemplated under the WARN Act.

On May 4, 1995, plaintiffs initiated the instant suit against Delchamps. Plaintiffs seek class certification on behalf of all employees discharged due to the closure of the

Calcasieu Parish stores, During a February 22, 1996, scheduling conference, all parties agreed that for the WARN Act provisions to apply, fifth or more employees must have suffered an employment loss at a single site of employment. *See,* 29 U.S.C. § 2101(a)(2); 20 C.F.R. § 639.3(b). The parties further agreed that the fifty employee threshold is not reached here unless all three stores are considered a "single site of employment." *See,* 20 C.F.R. § 639.3(1). Counsel acknowledged that this issue should be decided via summary judgment before the case proceeded further. Counsel were notified that the court would consider entering a *sua sponte* summary judgment on the issue of whether the three stores should be considered a "single site" under the WARN Act. The parties have extensively briefed the matter; and it is now ripe for decision.

Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue a to any material fact and that the moving party is entitled to a judgment as a matter of law. " Fed. R. Civ. P. 56(c).

> When seeking summary judgment, the movant bears the initial responsibility of demonstrating the absence of a genuine issue of material fact with respect to those issues on which the movant bears the burden of proof at trial. For any matter on which the non-movant would bear the burden of proof at trial, however, the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating

> by competent summary judgment proof that there is an issue of material fact warranting trial. Only when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party" is a full trial on the merits warranted.

Transamerica Insurance Co. v. Avenell, 66 F.3d 715, 718-19 (5th Cir. 1995)(citations omitted).

In deciding a summary judgement motion, the district court may consider all competent summary judgment evidence in the entire case file. *Resolution Trust Corp. v. Starkey,* 41 F.3d 1018, 1023 (5th Cir. 1995); *United States v. Houston Pipe Line Co.,* 37 F.3d 224, 227 (5th Cir. 1994).

Law

The WARN Act requires covered employers to notify "affected employees' of a mass layoff. "Affected employees" are those employees who "may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or a mass layoff by their employer." 29 U.S.C. § 2101(a)(5). In turn, a "mass layoff" is defined as any employment loss at a single site of employment which involves one-third of the employees at that site and at least fifty employees, or alternatively, at least five hundred employees. 29 U.S.C. § 2101(a)(3); 20 C.F.R. § 639.3(c). If a "mass layoff" occurs within the meaning of the WARN Act, the employer must provide 60 days advance written notice to each affected employee and notify various state and local officials of the impending layoff. 29 U.S.C. § 2102. An employer who runs afoul of the WARN Act is liable for back pay, lost benefits, civil penalties, and attorney's fees. 29 U.S.C. § 2104.

The WARN Act itself does not define "single site of employment." Instead, we must look to the regulations promulgated by the Department of Labor. They provide:

(1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(2) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.

(3) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of town and which are managed by a single employer may be considered separate sites if they employ different workers.

(4) The term "single site of employment" may also apply to unusual organizational situations where the above criteria do not reasonably apply.

20 C.F.R. § 639.3(1) (1988).

Whether multiple work locations constitute a "single site of employment" under the WARN Act is a mixed question of fact and law. *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 934 (5th Cir.), *cert. denied*, 115 S.Ct. 582 (1994) (citing, *Carpenters District Counsel v. Dillard Department Stores*, 15 F.3d 1275, 1289 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 922 (1995) (Whether multiple locations constitute a "single site" under the WARN Act is a legal conclusion to be drawn from the underlying historical facts)).

In their rebuttal memorandum, plaintiffs' assert that 16 of defendant's 25 proposed uncontested material facts *are* indeed contested. However, plaintiffs produce no competent summary judgment evidence to support their allegation. Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. *Williams v. Weber Management Serv.*, 839 F.2d 1039, 1041 (5th Cir. 1987). The material facts remain uncontroverted; our task is to draw a legal conclusion therefrom.

Facts

In the six months preceding February 17, 1985, Delchamps opened three stores in the Lake Charles/Sulphur area. Store Numbers 104 (Nelson Road) and 105 (Highway 14) were located in Lake Charles; Store Number 106 (Maplewood Drive) was situated in Sulphur. All three stores were built within 12 road miles of each other. The three Calcasieu Parish stores were built on a 33,387 square foot floor plan.[1] Shortly after the opening the Lake Charles/-

[1]Four other Delchamps stores opened in 1985 had the same square-footage.

Sulphur area stores, Delchamps initiated a six month advertising campaign in the local paper.[2]

In October 1994, due to declining sales and profits, the Delchamps hierarchy made a preliminary decision to close between twelve and fourteen of its unprofitable stores. In January, 1995, management revised and reduced the number of proposed store closures to seven. The estimated cost of closing the stores was $9,000,000. On February 28, 1995, store numbers 104, 105, and 113 (Monroe) were closed. Employees of the Lake Charles/Sulphur stores, who did not accept Delchamps' offer to transfer to other on-going stores, were discharged. *See,* White Affidavit.

Each Delchamps grocery store: prepared its own weekly sales report; had its own profit/loss statement; had its own payroll and maintained its own payroll records; had its own store manager (except for last two months Lake Charles/Sulphur stores were open); had its own assistant and department managers; determined its own product needs and placed resupply orders; and hired fired, and disciplined its own employees. White Affidavit.

Of the 88 workers employed at the three Lake Charles/Sulphur Delchamps stores over the stores' ten year lifespan, 27 employees, or roughly 30 percent, were permanently transferred between the stores. When a store was short-handed due to sickness, vacation, or attrition, tem-

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[2] The advertisement referred to the stores as "The New Delchamps Stores." The "s" at the end of the words appeared in a different font. Plaintiff's argue that the use of the different font implies that the three stores were one. After reviewing the advertisements, we draw no such inference. The same advertisement was used chain-wide. the different font was simply a matter of artistic license.

porary help was sometimes sought from area stores. Deposition, Wayne Wiggins, Area Manager. During the 31 weeks preceding the store closures, 18 employees, or 20 percent of the total Lake Charles/Sulphur workforce, temporarily helped out at area stores other than their own. Class representative, Robbie Viator, estimated that over his ten years with Delchamps, under 50 employees were temporarily re-assigned. When temporary personnel reassignments were necessary, the transferee store was responsible for the employees' wages while at the transferee store. White affidavit.

At least one employee recalls transferring cases, boxes and buckets from one store to another. Also, at least one employee stated that supplies were transferred from one store to another. *See,* plaintiffs' exhibits K-O. The only equipment commonly shared by the three stores was a pressure washer. Each store had its own floor machine and Telxon order machines. However, occasionally one store would be required to borrow a floor machine or Telxon computer from another store. There is also evidence that excess produce was transferred between stores.[3]

Legal Conclusions

First, store numbers 104, 105, and 106 are not contiguous, nor do they form a campus or an industrial park. 20 C.F.R. § 639.3(I)(1). Accordingly, to be considered a single site of employment, they must be within the same geographic proximity. 20 C.F.R. § 639.3(I)(2). The 12 mile maximum distance between the stores does not preclude them from

[3] Whenever a store transferred goods to another store, the transaction was documented, or an in-kind exchange was made.

being considered a single site of employment. *See, Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277 (8th Cir. 1996)(two facilities 11½ miles apart were impliedly considered in same geographic proximity).

The remaining inquiry focuses on whether the stores had the same purpose and shared the same staff and equipment. 20 C.F.R. § 639.3(I)(2 &3).

Whether the three stores shared the same operational purpose depends entirely on how broadly or narrowly we define the stores' operational purpose. Nevertheless, it cannot be disputed that the purpose of the three stores, (and all Delchamps store) is to showcase and sell foodstuff for profit.[4]

Even if the Lake Charles/Sulphur stores had a common purpose, they must still share the same staff and equipment. Occasional or periodic commingling is insufficient; an employer must "regularly" shift of rotate the "same employees" from one facility to another. 20 C.F.R. § 639.3(I)(2). Plaintiff has adduced evidence that a relatively small fractrion of employees were loaned between facilities. There is no evidence that the "same employees" were "regularly" shifted between sites. *Occasional* shifting of *various* employees is not enough. The regulations state by

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[4] In their Rebuttal Memorandum, plaintiffs rely heavily on target sales and expense figures for the three stores. Even though the sales grossly exceed expenses for all three stores, plaintiffs argue that only one store was unprofitable, since it did not meet the target projections. To do so, plaintiffs resort to an improvised expense/sales ratio. However, if we apply the same ratio to all three stores, they all appear profitable We can draw no meaningful conclusions from this data. Nor need we, since this issue is related to the store's common operational purpose which we have decided in plaintiffs' favor.

example that facilities on different sides of town should be considered *separate* sites if they employ "different workers." 20 C.F.R. § 639.3(I)(3).Here, each store employed its own workforce, and did not "share" the same staff. No employees were employed in common; the wages of any temporary transfers were paid by the transfereee store. Each store was, in essence, operated autonomously.

The same conclusion applies to the equipment regularly shared was a ressure washer. Other equipment and supplies were sometimes shared. Once again, this does not make the grade. *See, Hooper, infra.* Produce was transferred between stores when one store had a need, and the other a surplus. However, these transactions were documented, or on an in-kind basis. This is akin to friendly competitors who occasionally help each other out when one competitor experiences a shortage.

Other courts considering this issue have drawn the same conclusion from similar facts. In *Frymire v. Ampex Corp.,* despite managerial overlap, frequent employee transfers, and the joint employment of some employees, the Court found that there was no "shifting", "rotating", or "sharing" of employees which was necessary for two or more sites to be considered a single site of employment. *Frymire v. Ampex Corp.,* 61 F.3d 757, 767 (10th Cir. 1995), *cert. dismissed,* 116 S.Ct. 1588 (1996).

In *Wiltz v. M/G Transport Services, Inc.,* the court analogized eight tugboats to branch offices or stores on its way to holding that the tugboats could not be considered a single site of employment. *Wiltz v. M/G Transport Services, Inc.,* 1996 WESTLAW 239, 439 (E.D. Ky. 1996).

In *Fuentes v. Houston Industries.*, the court declined to combine 48 sites to form a single site of employment despite: only one human resources department, freely transferred employees between job sites, and layoffs at different sites within the same five day period, *Fuentes v. Houston Industries, Inc.*, 1994 WESTLAW 778892 (S.D. Tex. 1994).

In *McClain v. Laurel Street Art Club, Inc.*, an art production facility and a framing facility were not considered a single site. *McClain v. Laurel Street Art club, Inc.*, 925 F.Supp. 496 (E.D. Ky. 1995). The court reached this decision even though both facilities shared the same upper management; supplies for both facilities were ordered by one plant and delivered to and stored at the other; new equipment was shared; and roughly 20 percent of employees from one facility were sporadically used by the other. *Id.*

In *Rifkin v. McDonnell Douglas Corp., supra*, an occasional transfer of employees and office equipment did not constitute evidence of regular sharing.

In *Hooper v. Polychrome,* the plaintiff sought to combine two facilities: one which performed marketing, sales, and service functions for manufacturing plate processing equipment, and a plant which produced plate and film processing equipment. *Hooper v. Polychrome, Inc.*, 916 F.Supp. 1111 (D. Kan. 1996). The court stated that the periodic transfer of a significant number of employees from one facility to another could not be equated with the shifting, rotating, or sharing as required to find a single site of employment. *Id.* Moreover, sharing isolated pieces of equipment to periodically perform tasks does not evidence shared equipment. *Hooper, supra.*

The evidence viewed in the light most favorable to plaintiff compels a determination that Delchamps stores, 104, 105, and 106 should not be considered a "single site of employment" under the WARN Act.[5] As mentioned previously, there must be an emloyment loss of at least fifty (50) employees at a single site of employment for the protections of the WARN Act to attach. 29 U.S.C. § 2101(a)(3). Since we cannot consider all three stores as a single site, plaintiffs do not have the requisite number of affected employees; and they cannot pursue a claim under the WARN Act.

Accordingly, IT IS RECOMMENDED that summary judgment be entered in favor of defendant, Delchamps, Inc., and against plaintiffs Robbie Viator, *et al.*, dismissing plaintiffs' claims, with prejudice.

IT IS FURTHER RECOMMENDED that plaintiffs' motion for class certification be DENIED, as moot.

Under the provisions of 28 U.S.C. § 636(b)(1)(C), the parties have ten (10) business days from receipit of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge prior to a final ruling.

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[5] Also, the "unusual organizational situations" exception to the Department of Labor regulations is inapplicable here. 20 C.F.R. § 639.3(I)(4). Retail stores which are owned and operated by one firm are quite common an unexceptional in the modern business climate.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUL FINDINGS ON APPEAL, EXCEPT UPON GROUNDS OF PLAIN ERROR, THE UNOBJECTED TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT COURT.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this 1st day of July, 1996.

/s/ Alonzo P. Wilson

ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

ROBBIE A. VIATOR,*et al.*	:	DOCKET NO. CV 95-0797
VERSUS	:	JUDGE TRIMBLE
DELCHAMPS, INC.	:	MAGISTRATE JUDGE WILSON

FILED
AUG 13 1996

MEMORANDUM RULING

Currently before the court are the Plaintiff's objections to the Report and Recommendation regarding the court's factual findings and legal conclusions. With regard to the Plaintiff's objections to the court's factual findings we must consider Fed. R. Civ P. 52(a) which states that "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneeous..." The Supreme court has held that under the clearly erroneous standard, the reviewing court will reverse the lower court only if it "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

After reviewing the record, this court does not believe that a mistake has been committed by the Magistrate Judge, therefore his factual findings will not be disturbed.

Even if this were not the case, the objections to the factual findings are irrelevant because they do not affect the deciding issue of this case. The issue is whether the three Delchamps stores in question can be considered a "single site of employment" under the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C./ 2101, *et seq.* The plaintiff objects to the finding of fact without providing adequate summary judgment evidence to contradict those findings.

With regard to the plaintiff's objections concerning the legal conclusions, we must review whether the court made an error in drawing its legal conclusions in the Report and Recommendation. In order for the plaintiffs to sustain their burden of proof that the three closed Delchamps stores constituted a single site of employment under WARN, they had to establish that the three stores shared the "same staff and equipment." the record is clear, however, that each store employed its own workforce and did not share the same staff. Delchamps did not "regularly" shift or rotate employees or equipment between the stores.

This court will therefore adopt the Report and Recommendation as written.

Lake Charles, Louisiana, this 12th day of August, 1996.

/s/ James T. Trimble, Jr.

JAMES T. TRIMBLE, JR
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

ROBBIE A. VIATOR, *ET AL.*	:	CIVIL ACTION NO. 95-0797
VS.	:	JUDGE TRIMBLE
DELCHAMPS, INC.	:	MAGISTRATE JUDGE WILSON

FILED
AUG 13, 1996

J U G D M E N T

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein and after an independent review of the record and a *de novo* determination of the issues, and consideration of the objections filed therein, and having determined that the findings are correct under the applicable law, it is

ORDERED that the motion for summary judgment be and it is hereby granted in favor of defendant, Delchamps, Inc., and against plaintiffs Robbie Viator, *et al*, dismissing plaintiffs' claims with prejudice. It is

FURTHER ORDERED that plaintiffs' motion for class certification be denied as moot

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, the 12th day of August, 1996.

/s/ James T. Trimble, Jr.

JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

April 15, 1997

CHARLES R. FULBRUGE III
Clerk

Tel. 504-589-6514
600 CAMP STREET
New Orleans, La 70130

(MEMORANDUM TO COUNSEL)
(OR PARTIES LISTED BELOW)

Regarding: Fifth Circuit Statement on Petition for Rehearing or Rehearing En Banc

No. 96-30912 Viator, Et Al v. Delchamps Inc.
USDC No. 95-CV-797

Enclosed is a copy of the court's decision , and judgment has been entered under FRAP 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FRAPs 39 through 41, and Local Rules (LR) 35, 39, and 41 govern costs, rehearings, and mandates. **New LR's 35.2.10 and 40 require that a copy of the opinion or order sought to be reviewed shall be bound with the petition for rehearing or suggestion for rehearing en banc as an appendix but shall not be marked or annotated.** Please read carefully the Internal Operating Procedures (IOP's) following FRAP 40 and LR 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if a nonmeritorious

suggestion for en banc is made.

Direct Criminal Appeals. LR 41 provides that a motion for a stay of mandate under FRAP 41 shall not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate a substantial question is to be presented to the Supreme court. Otherwise, the motion may be denied and the mandate issued immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and will be considering filing a petition for *certiorari* in the United States Supreme Court, you do not need to file a motion for stay of mandate under FRAP 41. The issuance of the mandate does not affect the time, or your right, to file such a petition.

The judgment entered provides that appellants pay to appellee the costs on appeal.

Sincerely,

CHARLES R. FULBRUGE, III,
Clerk

By: /s/ Rhonda Flowers
Rhonda Flowers, Deputy Clerk

Enclosure
Mr James E. Hopkins
Mr Robert Joseph Tete
Mr Jeffrey A Schwartz
Ms Audrey N Browne

OPJDT-2

Robbie A. VIATOR, individually and on behalf of all persons similarly situated; Donnie R. Harmon, individually and on behalf of all persons similarly situated;Pamela S. Barbry, individually and on behalf of all persons similarly situated; Richard D. Keith; Patricia Douglas; Angela Romero; Donald Fontenot; Gerald Lee; Odelia Louise Tate; Dina Lopez; Michael Joseph Trahan; Angela R. Lopez; Steven Paul Johnson; Everett Paul Marshall; Gary Chester; Kevin B. Matte; Cynthia L. Rougeau; David Lee Patton; Bradley Fontenot; Tracy Barnes; Frank Berlin; Kathleen Crich; Nancy H. Bimle,
Plaintiffs-Appellants,

v.

DELCHAMPS INCORPORATED,
Defendant-Appellee.

No. 96-30912
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 15, 1997.

Former employees brought class action against employer, alleging violation of Worker's Adjustment Retraining and Notification Act (WARN) by failing to provide them with 60 days notice prior to employer's closing of three stores. The United States District Court for the Western District of Louisiana, James T. Trimble, Jr., J., granted employer's summary judgment motion, and class appealed. The

Court of Appeals, W. Eugene Davis, Circuit Judge held that three stores did not share same staff or equipment, and thus, could not be treated as "single site of employment" under WARN Act.

Affirmed.

Appeal from the United States District Court for the Western District of Louisiana.

Before DAVIS, EMILIO M. GARZA and STEWART, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Appellants, all previously employed by the grocery store chain Delchamps, Inc. in and around Lake Charles, Louisiana, filed the current class action lawsuit, alleging Delchamps violated the Worker's Adjustment Retraining and Notification Act ("WARN'), 29 U.S.C. §§ 2101-2109 (1994), by failing to provide them with sixty days notice prior to Delchamps' closing of its three area stores. The district court granted summary judgment in favor of Delchamps, concluding that Delchamps three Lake Charles area stores did not constitute a "single site of employment" under WARN and, therefore, that the stores did not employ enough workers to come within the scope of the Act. We affirm.

1.

In the six months preceding February 17, 1985, Delchamps opened three grocery stores in the greater Lake Charles area. All of the stores were located in Calcasieu

Parish, Louisiana, two in the city of Lake Charles and the other in nearby Sulphur, Louisiana. The three stores were located within approximately twelve miles of each other and all had the same 33,387 square foot floor p'.. Shortly after the three Lake Charles-area stores were opened, Delchamps initiated a coordinated six-month advertising campaign for the stores in the local paper.

Summary judgment evidence established that approximately twenty-seven employees, out of a total of eighty-eight persons employed by the three stores over a ten-year period, had been permanently transferred between stores on at least one occasion.Some eighteen employees had been temporarily transferred between stores during the thirty-one weeks preceding the closures as a result of loss of an employee, employee sickness or vacation, or similar employment needs. Similarly, limited transfers of inventory between the three stores were not un-common. The evidence established that Delchamps would occasionally transfer some inventory between the stores whenever necessary to assist with a temporry shortage in one of the stores.

However, further summary judgment, evidence established that each store prepared its own weekly sales report; had its own profit/loss statements; determined its own product needs and placed its own resupply orders; had its own management staff (except for the two months preceding the closures when the stores shared a common store manager); had its own payroll and maintained its own employees; and hired, fired, and disciplined its own workers. Delchamps also made sure that whenever an employee transfer occurred, the transferring employee's pay came from the temporary place of employment, rather than from the employee's base store.

Similarly, Delchamps carefully kept track of all inventory transfers and made sure that such inventory was either carried on the books of the receiving store or traded in exchange for other merchandise.

On February 14, 1995, as part of a larger reduction brought on by declining sales and profits, Delchamps announced its intent to close its three Lake Charles-area stores by the end of the month. The stores were closed on February 28, 1995. Employees of the Lake Charles-area stores who did not accept Delchamps offer to transfer to other stores were discharged.

On May 4, 1995, appellant filed the present lawsuit. The district court granted summary judgment in favor of Delchamps. The primary issue the court considered was whether or not the three Lake Charles-area stores constituted a "single site of employment" as defined by WARN and applicable Department of Labor ("DOL's) regulations. The court concluded that under the DOL's regulations, the stores could not be considered a single site of employment. Because none of the individual stores employed the statutory minimum of fifty full-time emplyees, the district court held that WARN does not apply to the closings. Appellants timely appealed.

II.

A.

[1,2] We review the district court's grant of summary judgment de novo. *Carpenters District Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc.* 15 F.3d 1275, 1281

(5th Cir.), *cert. denied*, ____ U.S. ____, 115 S.Ct. 933, 130 L.Ed.2d 879 (1994); *FDIC v. Myers*, 955 F.2d 348, 349 (5th Cir.1992). The issue of whether multiple work locations constitute a "single site of employment" under WARN is a mixed question of law and fact. *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 934 (5th Cir.), *cert. denied*, ____ U.S. ____, 115 S.Ct. 582, 130 L.Ed.2d 497 (1994). Accordingly, we review the district court's application of law de novo, *Carpenters District Council*, 15 F.3d at 1281; *United States v. Long*, 996 F.2d 731, 732 (5th Cir. 1993), while reviewing the court's findings of facts for clear error. *Carpenters District Council*, 15 F.3d at 1281; Fed.R.Civ.P. 52(a).

B.

WARN requires covered employers to notify "affected employees" of a "mass layoff." "Affected employees" are defined as "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." 29 U.S.C. § 2101(a)(5). A "mass layoff" includes any employment loss at a single site of employment which involves one third of the employees at that site and at least fifty employees, or alternatively, at least five hundred employees. 29 U.S.C. § 2101(a)(3). When such a layoff occurs, the employer must provide at least sixty days written notice to each affected employee and notify various state and local officials of the impending layoff 29 U.S.C. § 2102. An employer who fails to provide such notice is liable for back pay, lost benefits, civil penalties, and attorneys fees, 29 U.S.C. § 2104.

While WARN does not specifically define what constitutes a single site of employment, the DOL regulations do.

These regulations provide in relevant part:

> (3) *Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment.* An example is an employer who manages a number of warehouses in an area but who *regularly* shifts or rotates the same employees from one building to another.
>
> (4) *Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site.* For example, assembly plants which are located on opposite sides of town and which are managed by a single employer may be considered separate sites if they employ different workers.

20 C.F.R. § 639.3(i) (1996) (emphasis added). Moreover, the DOL made clear in its analysis of its implementing regulations that "[t]he general rule is that separate facilities are separate sites." 54 Fed.Reg. ¶ 16,050 (April 21, 1989). The DOL further added that exceptions to the general rule are "narrow" and limited to cases where geographically distinct sites have an "inextricable operational purpose." *Id.* at ¶ 16,049. As we observed in *Williams*, "[t]he regulations indicate that two plants across town will rarely be considered a single site for purposes of a mass layoff." *Williams*, 23 F.3d at 934.

[3] Based on the DOL's regulations and our case law, we conclude that separate facilities are only to be treated as a single site of employment if all three factors identified in

the regulations are met, namely: 1) the separate facilities are in "reasonable geographic proximity" of one another, 2) they are "used for the same purpose"; 3) and they "share the same staff and equipment." 20 C.F.R. § 693.3(i)(3). Any other reading would be inconsistent with the plain language of the regulation.

Because we agree with the district court that the three stores did not share the same staff or equipment, we need not address the other factors and express no view on the district court's resolution of these issues. We will consider separately the questions of whether the three Delchamps stores shared the same staff or equipment.

C.

[4] Appellants have adduced evidence that roughly 30 percent of full-time employees at the Lake Charles-area stores had been permanently transferred between stores at least once during a ten-year period. There is also evidence that in the thirty-one weeks leading up to the closures, roughly 20 percent of the total employees of the three stores had been transferred on a temporary basis to assist with temporary employment shortages in other stores. Such temporary transfers appear to have been of short duration ranging between a few hours to, in at least one instance, just over six weeks.

However, uncontroverted summary judgment evidence established that each of the stores employed and controlled its own work-force and that at no time did the stores employ workers in common. To the contrary, the record establishes that Delchamps took pains to ensure that any transferred

employee was paid by the temporary store, rather than the employee's base store. In short, there is simply no evidence that the stores routinely shifted the "same employees" between the sites.

[5] Even assuming these transfers constitute "sharing" of employees as envisioned by the regulations, the relatively small number of these transfers suggests that they do not rise to a sufficient level to consider the stores a single site of employment. The regulations strongly suggest that WARN only applies if an employer "regularly shifts or rotates the same employees from one building to another." 20 C.F.R. § 639.3(i)(3). In other words, occasional intermingling of various employees is insufficient to place an employer within the act's coverage. *See, e.g., Frymire v. Ampex Corp.*, 61 F.3d 757, 767 (10th Cir.1995) ("[E]ven assuming transfers did occur frequently, we cannot equate this phenomenon with the 'shifting,' 'rotating' or even 'sharing' of employees that defines a non-'separate' workforce.") (citations omitted); *Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277, 1281 (8th Cir.1996) ("[O]ccasional transfers of employees and office equipment . . . does not establish the necessary connection between locations to constitute a single site.") *Hooper v. Polychronne, Inc.*, 916 F.Supp. 1111, 1117 (D.Kan.1996) ("[E]ven assuming that a significant number of employees of either facility spent a portion of their time as the other facility spent a portion of their time at the other facility, we cannot equate this periodic occurrence with the 'shifing,' 'rotating' or even 'sharing' of employees of a non-'separate' workforce. . . .").

The regulations also state by way of example that facilities located on opposite sides of a town should be considered separate sites of employment if they employ "different

workers." 20 C.F.R. § 639.3(i)(4). Here, it is undisputed that nearly 70 percent of the total combined workers of the three stores over a ten year period were never permanently transferred between stores. An even greater number were never transferred on a temporary basis. Combined with the fact that no employee was over paid at one store for work performed at another, these numbers convince us that each Delchamps store employed "different workers" within the meaning of the DOL's regulations.

D.

[6] The same conclusion applies to appellants' claims that the stores routinely shared equipment. The only piece of equipment appellants have pointed to as being used commonly between the three stores is a single pressure washer. Appellants also point to several instances where produce or other inventory was transferred between stores when one store had a need and the other a surplus. Even assuming these occasional transfers of inventory are significant for purposes of the regulations, the record establishes that these transfers were either closely documented and accounted for on each store's separate books, or the inventory was traded for other merchandise. *See, e.g., Rifkin,* 78 F.3d at 1281 ("[O]ccasional transfers of employees and office equipment between the different sites . . . does not establish the necessary connection between locations to constitute a 'single site.' There is no evidence that employees and equipment are regularly shared as opposed to occasionally transferred.")' *Hooper,* 916 F.Supp. at 1117 ("[W]e do not believe that the use of isolated pieces of equipment . . . . mandates a determination of 'single site' states."). Under the circumstances we find no support for the conclusion that the stores regularly shared equipment.

III.

Because appellants have failed to produce competent summary judgment evidence establishing that Delchamps' three Lake Charles-area stores regularly shared the same staff or equipment, their WARN claims must fail. Accordingly, the order of the district court granting summary judgment in favor of Delchamps is AFFIRMED

AFFIRMED.

APPENDIX E

PUBLIC LAW 100-379 [S 2527]; August 4, 1988

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

Aug. 4- P.L. 2100-379

For a Related Legislative Report, see Conference Report (H.Rept. 100-576, title VI, subtitle E) on p. 2078.

An Act is required advance notification of plant closings and mass layoffs, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Worker Adjustment and Retraining Notification Act. Business and industry. Employment and unemployment 29 USC 2101 note.

SECTION 1. SHORT TITLE: TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Worker Adjustment and Retraining Notification Act".

(b) TABLE OF CONTENTS.—The table of contents is as follows:

Sec. 1. Short title.
Sec. 2. Definitions; exclusions from definition of loss of employmnent. USC 2101 note.
Sec. 3. Notice required before plant closings and mass layoffs.
Sec. 4. Exemptions.
Sec. 5. Administration and enforcement of requirements.

Sec. 6. Procedures in addition to other rights of employees.
Sec. 7. Procedures encouraged where not required.
Sec. 8. Authority to prescribe regulations.
Sec. 9. Effect on other laws.
Sec. 10. Report on employment and interntional competitiveness.
Sec. 11. Effective date.

29 USC 2101.

SEC. 2. DEFINITIONS; EXCLUSIONS FROM DEFINITION OF LOSS OF EMPLOYMENT.

(a) DEFINITIONS.— As used in this Act—

(1) the term "employer" means any business enterprise that employs—

(A) 100 or more employees, excluding art-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term "mass layoff" means a reduction in force which—

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for—

(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations ACt (29 U.S.C. 159(a), 158(f) or section 2 of the Railway Labor Act (45 U.S.C. 152);

(5) the term "affected employees' means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b), the term "employment loss" means (A) an employment termination, other than a discharge for cause voluntary departure, or retirment, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which

notoce is required.

(b) EXCLUSIONS FROM DEFINITION OF EMPLOYMENT LOSS.—(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layof in accordance with section 3 of this Act, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 3 of this Act. Notwithstanding any other provision of this Act, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(2) Notwithstanding subsection (a)(6), an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff—

(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer

or of the closing or layoff, whichever is later.

29 USC 2102

SEC. 3. NOTICE REQUIRED BEFORE PLANT CLOSINGS AND MASS LAYOFFS.

(a) NOTICE TO EMPLOYEES, STATE DISLOCATED WORKER UNITS, AND LOCAL GOVERNMENTS.—An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

(b) REDUCTION OF NOTIFICATION PERIOD.—(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this Act shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought curently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

(c) EXTENSION OF LAYOFF PERIOD.—A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this Act unless—

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

(d) DETERMINATIONS WITH RESPECT TO EMPLOYMENT LOSS.—For purposes of this section, in determining whether a plaint closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2(a)(2) or (3) but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this Act.

29 USC 2103

SEC. 4. EXEMPTIONS.

This Act shall not apply to a plant closing or mass layoff if—

(1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected emplyees were hired with the understanding that their

employment was limited to the duration of the facility or the project of undertaking; or

(2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the rquirements of this Act. Nothing in this Act shall rquire an emloyer to serve written notice pursuant to section 3(a) of this Act when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act: *Provided*, That nothing in this Act shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacement for economic strikers under the National Labor Relations Act.

Aug. 4- WORKER NOTIFICATION ACT- P.L. 100-379

20 USC 2104.

SEC. 5. ADMINISTRATION AND ENFORCEMENT OF REQUIREMENTS.

(a) CIVIL ACTIONS AGAINST EMPLOYERS.—(1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

Wages

(A) back pay for each day of violation at a rate of compensation not less than the higher of—

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee, and

Health and medical care.

(B) benefits under an employee benefit plan described in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)), including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by—

Wages.

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

Health and medical care Retirement.

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of an attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employer who violates the provisions of section 3 with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall

not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

Courts, U.S.

(4) If an employer which has violated this Act proves to the satisfaction of the court that the act or omission that violated this Act was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Act the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

State and local governments.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

Courts, U.S.

(6)In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and

who, as a result of the failure by the employer to comply with secton 3, did not receive timely notice either directly or through his or her representative as required by section 3.

Courts, U.S.

(b) EXCLUSIVITY OF REMEDIES.—The remedies provided for in this section shall be the exclusive remedies for any violation of this Act. Under this Act, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

29 USC 2105

SEC. 6. PROCEDURES IN ADDITION TO OTHER RIGHTS OF EMPLOYEES.

Contracts.

The rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this Act shall run concurently with any period of notification required by contract or by any other statute.

29 USC 2106.

SEC. 7. PROCEDURES ENCOURAGED WHERE NOT REQUIRED.

It is the sense of Congress that an employer who is not required to comply with the notice requirements of secton 3 should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

29 USC 2107.

SEC. 8. AUTHORITY TO PRESCRIBE REGULATIONS.

(a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this Act. Such regulations shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for appropriate service of notice as required by this Act.

(b) The mailing of notice to an employee's last known address or inclusion of notice in the employee's paycheck will be considered acceptable methods for fulfillment of the employer's obligation to give notice to each affected employee under this Act.

29 USC 2108.

SEC. 9. EFFECT ON OTHER LAWS.

The giving of notice pursuant to this Act, if done in good faith compliance with this Act, shall not constitute a violation of the National Labor Relations Act or the Railway Labor Act.

29 USC 2109.

SEC. 10. REPORT ON EMPLOYMENT AND INTERNATIONAL COMPETITIVENESS.

Two years after the date of enactment of this Act the Comptroller General shall submit to the Committee on Small Business of both the House and Senate, the Committee on labor and Human Resources, and the Committee on Education and Labor a report containing a

detailed and objective analysis of the effect of this Act on employers (especially small- and medium-sized business), the economy (international competitiveness), and employees (in terms of levels and conditions of employment). The Comptroller General shall assess both costs and benefits, including the effect on productivity, competitiveness, unemployment rates and compensation, and worker retraining and readjustment.

29 USC 2101 note.

SEC. 11. EFFECTIVE DATE.

This Act shall take effect on the date which is 6 months after the date of enactment of this Act, except that the authority of the Secretary of Labor under section 8 is effective upon enactment.

[Note by the Office of the Federal Register.—The foregoing Act, having been presented to the President of the United States on Friday, July 22, 1988, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, has become law without his signature on August 4, 1988.]

LEGISLATIVE HISTORY—S. 2527:

CONGRESSIONAL RECORD, Vol. 134 (1988):
June 22-24, 27-29, July 6, considered and passed Senate.
July 13, considered and passed House.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 23 (1988):
Aug. 2, Presidential statement.

APPENDIX F

PART 639—WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

Sec.

639.1 Purpose and scope.
639.2 What does WARN require?
639.3 Definitions.
639.4 Who must give notice?
639.5 When must notice be given?
639.6 Who must receive notice?
639.7 What must the notice contain?
639.8 How is the notice served?
639.9 When may notice be given less that 60 days in advance.
639.10 When may notice be extended?

Employment and Training Administration, Labor

AUTHORITY: 29 U.S.C. 2107(a)

Source: 54 FR. 16064, Apr. 20, 1989, unless otherwise noted.

§ 639.1 Purpose and scope.

(a) *Purpose of WARN.* The Worker Adjustment and Retraining Notification Act (WARN or the Act) provides protection to workers, their families and communities by requireing employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to

adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

(b) *Scope of these regulations.* These regulations establish basic definitions and rules for giving notice implementing the provisions of WARN. The Department's objective is to establish clear principles and broad guidelines which can be applied in specific circumstances. However, the Department recognizes that Federal rulemaking cannot address the multitude of industry and company-specific situations in which advance notice will be given.

(c) *Notice encouraged where not required.* Section 7 of the Act states:

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 3 should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

(d) *WARN enforcement.* Enforcement of WARN will be through the courts, as provided in section 5 of the statute. Employees, their representatives and units of local government may initiate civil actions against employers believed to be in violation of §3 of the Act. The Department of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions of specific cases. The Department will provide assistance in

understanding these regulations and may revise them from time to time as may be necessary.

(e) *Notice in ambiguous situations.* It is civically desirable and it would appear to be good business practice for an employer to provide advance notice to its workers or unions, local government and the State when terminating a significant number of employees. In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN to business practices in the market economy that cannot be addressed in these regulations. It is therefore prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve disputes where notice has not been given. The Department encourages employers to give notice in all circumstances.

(f) *Coordination with job placement and retraining programs.* The Department, through these regulations and through the Trade Adjustment Assistance Program (TAA) and Economic Dislocation and Worker Adjustment Assistance Act (EDWAA) regulations, encourages maximum coordination of the actions and activities of these programs to assure that the negative impact of dislocation on workers is lessened to the extent possible. By providing for notice to the State dislocated worker unit, WARN notice begins the process of assisting workers who will be dislocated.

(g) *WARN not to supersede other laws and contracts.* The provisions of WARN do not supersede any laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If such law or agreement provides for a longer notice period. WARN notice shall run

concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN but may not reduce WARN rights.

§ 639.2 What does WARN require?

WARN requires employers who are planning a plant closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. While the 60-day period is the minimum for advance notice this provision is not intended to discourage employers from voluntarily providing longer periods of advance notice. Not all plant closings and layoffs are subject to the Act, and certain employment thresholds must be reached before the Act applies. WARN sets out specific exemptions, and provides for a reduction in the notification period in particular circumstances. Damages and civil penalties can be assessed against employers who violate the Act.

§639.3 Definitions.

(a) *Employer.* (1) The term "employer" means any business enterprise that employs—

(i) 100 or more employees, excluding part-time employees; or

(ii) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime.

Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees.

An employee has a "reasonable expectation of recall" when he/she understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job. The term "employer" includes non-profit organizations of the requisite size. Regula Federal, State, local and federally recognized Indian tribal governments are not covered. However, the term "employer" includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets.

(2) Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

(3) Workers, other than part-time workers, who ar exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as an employer.

(4) An emplyer may have one or more sites of employment under common ownership or control. An example would be a major auto maker which has dozens of automobile plants throughout the country. Each plant would be considered a site of emplyment, but there is only one "employer", the auto maker.

(b) *Plant closing.* The term "plant closing" means the permanent or temporary shutdown of a "single site of employment", or one or more "facilities or operating units" within a single site of employment, if the shutdown results in an "employment loss" during *any 30-day period* at the single site of employment for *50 or more* employees, excluding any part-time employees. An employment action that results in the effective cessation of production or the work performed by unit, even if a few employees remain, is a shutdown. A "temporary shutdown" triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of "employment loss."

(c) *Mass layoff.* (1) The term "mass layoff" means a reduction in force which first, is not the result of a plant closing, and second, results in an employment loss at the single site of employment during *any 30-day period* for:

(i) *At least 33 percent* of the active employees, excluding part-time employees, and

(ii) *At least 50 emloyees,* excluding part-time employees.

Where 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply, and notice is required if the other criteria are met. Plant closings involve employment loss which results from the shut-

down of one or more distinct units within a single site or the entire site. A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site.

(2) Workers, other than part-time workers, who ar exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as a plant closing or mass layoff. For example, if an employer closes a temporary project on which 10 permanent and 40 temporary workers are employed, a covered plant closing has occurred although only 10 workers are entitled to notice.

(d) *Representative.* The term "representative" means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act or section 2 of the Railway Labor Act.

(e) *Affected employees.* The term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. This includes individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The term "affected employees" includes managerial and supervisory employees, but does not include business partners. Consultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not "affected employees" of the business to which they are assigned. In addition, for purposes of derterminging whether coverage thresholds are met, either incumbent workers in jobs being

eliminated or, if known 60 days in advance, the actual employees who suffer an employment loss may be counted.

(f) *Employment loss.* (1) The term "employment loss" means (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a reduction in hours of work of individual employees of more than 50% during each month of any any 6-month period.

(2) Where as temination or a layoff (see paqragraphs (f)(1)(i) and (ii) of this section) is involved, an employment loss does not occur when an employee is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntry termination.

(3) An employee is not considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, or all of the employer's business and prior to the closing or layoff.

(i) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment, or

(ii) The employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in emloyment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(4) A "relocation or consolidation" of part or all of an employer's business, for purposes of paragraph § 639.3(h)(4)

means that some definable business, whether customer orders, product lines, or operations, is transferred to a different site of employment and that transfer results in a plant closing or mass layoff.

(g) *Unit of local government.* The term "unit of local government" means any general purpose political subdivision of a State, which has the power to levy taxes and spend funds and which also has general corporate and police powers. When a covered employment site is located in more than one unit of local government, the employer must give notice to the unit to which it determines it directly paid the highest taxes for the year preceding the year for which the determination is made. All local taxes directly paid to the local government should be aggregated for this purpose.

(h) *Part-time employee.* The term "part-time" employee means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required, including workers who work full-time. This term may include workers who would traditionally be understood as "seasonal" employees. The period to be used for calculating whether a worker has worked "an average of fewer than 20 hours per week" is the shorter of the actual time the worker has been employed or the most recent 90 days.

(i) *Single site of employment.* (1)A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(2) There may be several single sites of employment

within a single building, such as an office building, if separate employers conduct activities within such a building. For example, and office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be its single site of employment.

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.

(4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.

(5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is

assigned, or to which they report will be the single site in which they are covered for WARN purposes.

(7) Foreign sites of employment are not covered under WARN. U.S. workers at such sites are counted to determine whether an employer is covered as an employer under § 639.3(a).

(8) The term "single site of employment" may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not acceptable.

(j) *Facility or operating unit.* The term 'facility" refers to a building or buildings. The term "operating unit" refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site.

(k) *State dislocated worker unit.* The term "State dislocated worker unit" means a unit designated or created in each State by the Governor under title III of the Job Training Partnership Act, as amended by EDWAA.

(l) *State.* For the purpose of WARN, the term "State" includes the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

§ 639.4 Who must give notice?

Section 3(a) of WARN states that "an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order * * *" Therefore, an employer who is anticipating

carrying out a plant closing or mass layoff is required to give notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. (See definitions in § 639.3 of this part.)

(a) It is the responsibility of the employer to decide the most appropriate person within the employer's organization to prepare and deliver the notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. In most instances, this may be the local site plant manager, the local personnel director or a labor relations officer.

(b) An employer who has previously announced and carried out a short term layoff (6 months or less) which is being extended beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an emplyment loss from the date of its commencement.

(c) In the case of the sale of part or all of a business, section 2(b)(1) of WARN defines who the "employer" is. The seller is responsible for providing notice of any plant closing or mass layoff which takes place up to and including the effective date (time) of the sale, and the buyer is responsible for providing notice of any plant closing or mass layoff that takes place thereafter. Affected employees are always entitled to notice; at all time the employer is responsible for providing notice.

(1) If the seller is made aware of any definite plans on the part of the buyer to carry out a plant closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as agent of the buyer, if so empowered. If the seller does not give notice, the buyer is nevertheless, responsible to give notice. If the seller gives notice as the buyer's agent, the responsibility for notice still remains with the buyer.

(2) It may be prudent for the buyer and seller to determine the impact of the sale on workers, and to arrange between them for advance notice to be given to affected employees or their representative(s), if a mass layoff or plant closing is planned.

§ 639.5 When must notice be given?

(a) *General rule,* (1) With certain exceptions discusssed in paragraphs (b), (c) and (d) of this section and in §639.9 of this part, notice must be given at least 60 calendar days prior to any planned plant closing or mass layoff, as defined in these regulations. When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement. A worker's last day of employment is considered the date of that worker's layoff. The first and each subsequent group of terminees are entitled to a full 60 days' notice. In order for an employer to decide whether issuing notice is required. the employer should—

(i) Look ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate for any 30-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger

the notice requirement; and

(ii) Look ahead 90 days and behind 90 days to determine whether employment actions both taken and planned each of which separately is not of sufficient size to trigger WARN coverage will, in the aggregate for any 90-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement. An employer is not, however, required under section 3(d) to give notice if the employer demonstrates that the separate employment losses are the result of separate and distinct actions and causes, and are not an attempt to evade the requirements of WARN.

(2) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given. If this "snapshot" of the number of employees employed on that date is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage. Examples of unrepresentative employment levels include cases when the level is near the peak or trough of an employment cycle or when large upward or downward shifts in the number of employees occur around the time notice is to be given. A more representative number may be an average number of employees over a recent period of time or the number of employees on an alternative date which is more representative of normal employment levels. Alterative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances.

(b) *Transfers.* (1) Notice is not required in certain cases involving transfers, as described under the definition of "employment loss" at § 639.3(f) of this part.

(2) An offer of reassignment to a different site of employment should not be deemed to be a "transfer" if the new job constitutes a constructive discharge.

(3) The meaning of the term "reasonable commuting distance" will vary with local and industry conditions. In determining what is a "reasonable commuting distance", consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time.

(4) In cases where the transfer is beyond reasonable commuting distance, the employer may become liable for failure to give notice if an offer to transfer is not accepted within 30 days of the offer or of the closing or layoff (whichever is later). Depending upon when the offer of transfer was made by the employer, the normal 60-day notice period may have expired and the plant closing or mass layoff may have occurred. An employer is, therefore, well advised to provide 60-day advance notice as part of the transfer offer.

(c) *Temporary employment.* (1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking.

(2) Employees must clearly understand at the time of hire that their employment is temporary. When such understandings exist will be determined by reference to employment contracts, collective bargaining agreements, or

employment practices of an industry or a locality, but the burden of proof will lie with the employer to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings.

(3) Employers in agriculture and construction frequently hire workers for harvesting, processing, or for work on a particular building or project. Such work may be seasonal but recurring. Such work falls under this exemption if the workers understood at the time they were hired that their work was temporary. In uncertain situations, it may be prudent for employers to clarify temporary work understandings in writing when workers are hired. The same employers may also have permanent employees who work on a variety of jobs and tasks continuously through most of the calendar year. Such employees are not included under this exemption. Giving written notice that a project is temporary will not convert permanent employment into temporary work, making jobs exempt from WARN.

(4) Certain jobs may be related to a specific contract or order. Whether such jobs are temporary depends on whether the contract or order is part of a long-term relationship. For example, an aircraft manufacturer hires workers to produce a standard airplane for the U.S. fleet under a contract with U.S. Air Force with the expectation that its contract will continue to be renewed during the foreseeable future. The employees of this manufacturer would not be considered temporary.

(d) *Strikes or lockouts.* The statute provides an exemption for strikes and lockouts which are not intended to evade the requirements of the Act. A lockout occurs when, for

tactical or defensive reasons during the course of collective bargaining or during a labor dispute, an employer lawfully refuses to utilize some or all of its employees for the performance of available work. A lockout not related to collective bargaining which is intended as a subterfuge to evade the Act does not qualify for this exemption. A plant closing or mass layoff at a site of employment where a strike or lockout is taking place, which occurs for reasons unrelated to a strike or lockout, is not covered by this exemption. An employer need not give notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act. Non-striking employees at the same single site of employment who experience a covered employment loss as a result of a strike are entitled to notice; however, situations in which a strike or lockout affects non-striking employees at the same plant may constitute an unforeseeable business circumstances, as discussed in § 639.9, and reduced notice may apply. Similarly, the "faltering company" exception, also discussed in § 639.9, and reduced notice may apply. Similarly, the "faltering company" exception, also discussed in § 639.9 may apply in strike situations. Where a union which is on strike represents more than one bargaining unit at the single site, non-strikers includes the non-striking bargaining units(s). Notice also is due to those workers who are not a part of the bargaining unit(s) which is involved in the labor negotiations that led to the lockout. Employees at other plants which have not been struck, but at which covered plant closing or mass layoffs occur as a direct or indirect result of a strike or lockout are not covered by the strike/lockout exemption. The unforeseeable business circumstances exceptions to 60 days' notice also may apply to these closings or layoffs at other plants.

§639.6 Who must receive notice?

Section 3(a) of WARN provides for notice to each representative of the affected employees as of the time notice is required to be given or, if there is no such representative at that time, to each affected employee. Notice also must be on the State dislocated worker unit and the chief elected official of the unit of local government within which a closing or layoff is to occur. Section 2(b)(1) of the Act states that "any person who is an employee of the seller (other than a part-time employee) as of the effective date [time] of the sale shall be considered an employee of the purchaser immediately after the effective date [time] of the sale." This provision preserves the notice rights of the employees of a business that has been sold, but creates no other employment rights. Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective. WARN notice is only required where the employees, in fact, experience a covered employment loss.

(a) *Representative(s) of affected employees.* Written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local union(s) representing affected employees, it is recommended that a copy also be given to the local union official(s).

(b) *Affected employees.* Notice is required to be given to employees who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumpting rights or other factors, to the extent that such workers can be identified at the time notice is required to be given. If, at the time notice is required to be given. If, at the time notice is required to be given, the

employer cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, the employer must provide notice to the incumbent in that position. While part-time employees are not counted in determing whether plant closing or mass layoff thresholds are reached, such workers are due notice.

(c) *State dislocated worker unit.* Notice is to be served upon the State dislocated worker unit. Since the States are restructuring to implement training under EDWAA, service of notice upon the State Governor constitutes service upon the State dislocated worker unit until such time as the Governor makes public State procedures or serving notice to this unit.

(d) *Chief elected official of the unit of local government.* The identity of the chief elected official will vary according to the local government structure. In the case of elected boards, the notice is to be served upon the board's chairperson.

§ 639.7 What must the notice contain?

(a) *Notice must be specific.* (1) All notice must be specific.

(2) Where voluntary notice has been given more than 60 days in advance, but does not contain all of the required elements set out in this section, the employer must ensure that all of the information required by this section is provided in writing to the parties listed in § 639.6 at least 60 days in advance of a covered employment action.

(3) Notice may be given conditional upon the occurrence or nonoccurrence of an event, such as the renewal of a

major contract, only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of a business, lead to a covered plant closing or mass layoff less than 60 days after the event. For example, if the non-renewal of a major contract will lead to the closing of the plant that produces the articles supplied under the contract 30 days after the contract expires, the employer may give notice at least 60 days in advance of the projected closing date which states that if the contract is not renewed, the plant closing will occur on the projected date. The notice must contain each of the elements set out in this section.

(4) The information provided in the notice shall be based on the best information available to the employer at the time the notice is served. It is not the intent of the regulations, that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN.

(b) As used in this section, the term "date" refers to a specific date or to a 14-day period during which a separation or separations are expected to occur. If separations are planned according to a schedule, the schedule should indicate the specific dates on which or the beginning date of each 14-day period during which any separations are expected to occur. Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period.

(c) Notice to each representative of affected employees is to contain:

(1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name

and telephone number of a company official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) The expected date of the first separation and the anticipated schedule for making separations;

(4) The job titles of positions to be affected and the names of the workers currently holding affected jobs.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expeced to be temporary, the estimated duration, if known.

(d) Notice to each affected employee who does not have a representative is to be written in language understandable to the employees and is to contain:

(1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(2) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;

(3) An indication whether or not bumping rights exist.

(4) The name and telephone number of a company

official to contact for further information.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(c) The notices separately provided to the State dislocated worker unit and to the chief elected official of the unit of local government are to contain:

(1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) The expected date of the first separation, and the anticipated schedule for making separations;

(4) The job titles of positions to be affected, and the number of affected employees in each job classification;

(5) An indication as to whether or not bumping rights exist;

(6) The name of each union representing affected employees, and the name and address of the chief elected officer of each union.

The notice may include additional information useful to the employees such as a statement of whether the planned action is expected to be temporary and, if so, its expected duration.

(f) As an alternative to the notices outlined in paragraph (e) above, an employer may give notice to the State dislocated worker unit and to the unit of local government by providing them with a written notice stating the name of address of the employment site where the plant closing or mass layoff will occur; the name and telephone number of a company official to contact for further information; the expected date of the first separation; and the number of affected employees, The employer is required to maintain the other information listed in § 639.7(e) on site and readily accessible to the State disclocated worker unit and to the unit of general local government. Should this information not be available when requested, it will be deemed a failure to give required notice.

§ 639.8 How is the notice served?

Any reasonable method of delivery to the parties listed under § 639.6 of this part which is designed to ensure receipt of notice of least 60 days before separation is acceptable (e.g., first class mail, personal delivery with optional signed receipt). In the case of notification directly to affected employees, insertion of notice into pay envelopes is another viable option. A ticketed notice, i.e., preprinted notice regularly included in each employee's pay check or pay envelope, does not meet the requirements of WARN.

§ 639.9 When may notice be given less than 60 days in advance?

Section 3(b) of WARN sets forth three conditions under which the notification period may be reduced to less than 60 days.The employer bears the burden of proof that conditions for the exceptions have been met. If one of the exceptions is applicable, the employer must give as much notice as is practicable to the union, non-represented employees, the State dislocated worker unit, and the unit of local government and this may, in some cicumstances, be notice after the fact. The employer must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in additon to the other elements set out in § 639.7.

(a) The exception under section 3(b)(1) of WARM, termed "faltering company", applies to plant closings but not to mass layoffs and should be narrowly construed. To qualify for reduced notice under this exception:

(1) An employer must have been actively seeking capital or business at the time that 60-day notice would have been required. That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business.

(2) There must have been a realistic opportunity to

obtain the financing or business sought.

(3) The financing or business sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown. The employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enable the employer to keep the facility, operating unit, or site open for a reasonable period of time.

(4) The employer reasonably and in good faith must have believed that giving the required notice would have precluded the employer from obtaining the needed capital or business. The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit, or site might have to close. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs. The actions of an employer relying on the "faltering company" exception will be viewed in a company-wide context. Thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial conditions of the facility, operating unit, or site to be closed.

(b) The "unforeseeable business circumstances" exception under section 3(b)(2)(A) of WARN applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day

notice would have been required.

(1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

(2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

(c) The "natural disaster" exception in section 3(b)(2)(B) of WARN applies to plant closings and mass layoffs due to any form of a natural disaster.

(1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.

(2) To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is

a direct result of a natural disaster.

(3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in § 639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.

(4) Where a plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the "unforeseeabale business circumstance" exception described in paragraph (b) of this section may be applicable.

§ 639.10 When may notice be extended?

Additional notice is required when the date or schedule of dates of a planned plant closing or mass layoff is extended beyond the date of the ending date of any 14-day period announced in the original notice as follows:

(a) If the postponement is for less than 60 days, the additional notice should be given as soon as possible to the parties identified in § 639.6 and should include reference to the earlier notice the date (or 14-day period announced in the original notice as follows:

(a) If the postponement is for less than 60 days, the additional notice should be given as soon as possible to the parties identified in § 639.6 and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for postponement. The notice should be given in a manner which will provide the

information to all affected employees.

(b) If the postponement is for 60 days or more, the additional notice should be treated as new notice subject to the provisions of §§639.5, 639.6 and 639.7 of this part. Rolling notice, in the sense of routine periodic notice given whether or not a plant closing or mass layoff is impending, and with the intent to evade the purpose of the Act rather than give specific notice as required by WARN, is not acceptable.

PART 640—STANDARD FOR BENEFIT PAYMENT PROMPTNESS—UNEMPLOYMENT COMPENSATION

Sec.

640.1 Purpose and scope.
640.2 Federal law requirements.
640.3 Interpretation of Federal law requirements.

APPENDIX G

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SUBTITLE E—ADVANCE NOTIFICATION OF PLANT CLOSINGS AND MASS LAYOFFS

Present law

There is no present law for this provision.

House bill

The House bill contains no comparable provision.

1. SHORT TITLE (SEC. 6401 OF CONFERENCE AGREEMENT)

Senate amendment

The Senate Amendment has no provision for a short title. The advance notification provisions were identified as Part B of the Economic Dislocation and Worker Adjustment Assistance Act.

Conference agreement

The Conference Agreement separates the advance notification provisions from the worker adjustment provisions of the Economic Dislocation and Worker Adjustment Assistance Act. Section 6401 of the Conference Agreement

creates a new subtitle for the advance notification provisions. The short title for this subtitle is the Worker Adjustment and Retaining Notification ("WARN") Act. By separating the advance notification provisions from the worker adjustment provisions, the Conferees intend as an administrative matter for the WARN Act to be an original law, not an amendment to the Job Training Partnership Act. At the same time, the Conferences reaffirm that advance notice is an essential component of a successful worker readjustment program, and they regard the two subtitles as closely interrelated.

2. DEFINITIONS/EXCLUSIONS FROM DEFINITIONS (SEC. 331, 334 (1), (2) OF SENATE AMENDMENT; SEC. 6402 OF CONFERENCE AGREEMENT)

Senate amendment

The Senate Amendment defines the terms "employer," "plant closing," "mass layoff," "representative," "affected employees," "employment loss," "unit of local government," "part-time employmee," and "seasonal employee."

The Senate Amendment includes exemptions from notification for plant closings or mass layoffs resulting from the sale or relocation of a business. Under the exemption for sales, no notice is required if the plant closing or mass layoff results from the sale to hire substantially all affected employees with no more than a six-month break in employment. Under the relocation exemption, no notice is required if the plant closing or mass layoff results from a relocation of a business within a reasonable commuting distance and the employer offers to transfer substantially all affected employees to the new location with no more than a six-month break in employment.

Conference agreement

The Conference Agreement adopts the definitions in the Senate Amendment with the following modifications:

"Employer". The Conference Agreement retains the Senate Amendment language that the term "employer" means a business enterprise. The Conferees intend that a "business enterprise" be deemed synonymous with the terms company, firm or business, and that it consist of one or more sites of employment under common ownership or control. For example, General Motors has dozens of automobile plants throughout the country. Each plant would be considered a site of employment, but as provided in the bill, there is only one "employer"—General Motors.

"Plant Closing". The Conference Agreement strikes all references to "place of employment" and replaces them with "single site of employment." This change is intended to clarify that geographically separate operations are not to be combined when determining whether the employment threshold for triggering the notice requirement is met. For example, an automobile assembly plant on the east side of town and an assembly plant on the west side of town ordinarily would be two separate "sites of employment." On the other hand, an assembly plant on the east side of town that happens to extend to both sides of a public street is *not* two distinct "Sites."

The Conferees otherwise retain the Senate language, but wish to clarify that a "temporary shutdown" triggers the notice requirement only if there are a sufficient number of terminations or layoffs exceeding six months, as specified under the definition of "employment loss."

"Mass Layoff". The Conference Agreement modifies the Senate Amendment so that the 33 percent requirement applies only to a mass layoff that involves more than 49 but fewer than 500 employees. Where the employment loss involves 500 or more employees, the 33 percent requirement would not apply, and notice would be required. The Conferees believe that layoffs involving 500 or more people are likely to cause significant economic disruption in local communities, as well as the obvious disruption for the individuals involved. Thus, the rationale for advance notice is strong—the need for individuals and communities to begin planning for dislocation before the dislocation occurs. The justification for a 33 percent requirement for layoffs before notice is required has been the representation by business interests that small layoffs of 50 or 100 or even 200 employees at a single site with a workforce of perhaps a thousand or more employees are such a regular part of business that requiring notice in these circumstances would be unduly burdensome. Because a layoff of 500 employees at a site of employment is a significant and unusual action, even in a large workforce of 2000 or more employees, the requirement of advance notice in these situations should not place an undue burden on employers.

"Employment Loss". The Senate Amendment includes two kinds of layoffs that would trigger the bill's requirements—those of indefinite duration and those of

definite duration exceeding 6 months. The Conference Agreement combines these into a single triggering event—a layoff exceeding 6 months. The Senate Amendment includes within its definition of an employment loss a reduction in hours of more than 50 percent during any 6-month period. The Conference Agreement clarifies that this reduction in hours must occur in each of 6 consecutive months to be considered an employment loss. As an example, an employee who works less than half-time for five consecutive months, but who works full-time in the sixth, would not be considered to have experienced an employment loss.

"Part-time employee". The Senate Amendment defines a "part-time employee" as one who is hired to work an average of fewer than 15 hours per week. It also defines a "seasonal employee" as one who is hired for a period not to exceed 3 months per year to do work that is seasonal in nature. The Conference Agreement combines these concepts into a single definition of "part-time" employee, which includes employees who work fewer than 20 hours per week or who have worked fewer than 6 months in the 12-month period prior to the point at which the employer is required to serve notice. The definition of "seasonal employee" is therefore eliminated.

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Exclusions from Definition of Employment Loss. The Conference Agreement incorporates the exemptions from notification for sales and relocations of a business in modified form as exclusions from the definition of "employment loss." Thus,

a closing or layoff resulting from the sale of part or all of the employer's business does *not* give rise to an employment loss if

(a) the employee is covered at the time of the sale by a written rehire agreement between the buyer and the seller of the business to which the employee is explicitly made a third party beneficiary with rights against the purchaser under applicable state law; or

(b) the employee within 30 days after the sale is offered employment by the buyer.

In addition, a closing or layoff resulting from the relocation or consolidation of part or all of the employer's business does *not* give rise to an employment loss for a particular employee if, prior to the employee's termination or layoff,

(a) the employer offers to transfer that employee within a reasonable commuting distance; or

(b) the employer offers to transfer the employee to any other site of employment regardless of distance, and the employee accepts within 30 days of the offer or of the termination or layoff, whichever is later.

An example to which this may apply would be a situation where an employer owns five grocery stores in a metropolitan area. After deciding that one of the stores is no longer competitive, the employer decides to shut it down and makes a timely offer to transfer its employees to one or more of the remaining stores with no more than a six-month break in employment.

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3. NOTICE REQUIREMENTS (SEC. 332 (A) OF SENATE AMENDMENT; SEC. 6403 (A) OF CONFERENCE AGREEMENT)

Senate amendment

The Senate Amendment requires 60 days notice in advance of a plant closing or mass layoff to affected employees (or their representative), to the State dislocated worker unit designated or created under the Economic Dislocation and Worker Adjustment Assistance Act, and to the chief elected official of the unit of local government where the closing or layoff occurs.

Conference agreement

The Conference Agreement adopts the Senate provision.

4. REDUCTION OF NOTIFICATION PERIOD (SEC. 332 (B) OF SENATE AMENDMENT: SEC. 6403 (B) OF CONFERENCE AGREEMENT)

Senate amendment

The Senate Amendment provides for a reduction of the notification period in two specific circumstances. Under the "faltering company" exception, an employer actively seeking

capital or business which would avoid or postpone indefinitely a shutdown, need not give the full 60 days notice if the employer reasonably and in good faith believes that notice would preclude the employer from obtaining the needed capital or business.

Under the second exception, the notice requirement is reduced if the closing or mass layoff is caused by business circumstances not reasonably foreseeable at the time notice would have been required. Both exceptions require the employer to give as much notice as is practicable and provide a brief statement of the basis for reducing the notice period.

Conference agreement

After some discussion, the Conferees agree to retain both exceptions, but wish to clarify the meaning of the Senate Amendment as follows:

Faltering Company. The provision would permit, under specifically defined circumstances, an employer to shut down one or more sites of employment without providing the full notice required by the bill. The defense is intended as a narrow one applicable only where it was unclear 60 days before the closing whether the closing would occur; the employer was actively pursuing measures that would avoid or indefinitely postpone the closing; and the employer reasonably believed both that it had a realistic opportunity of obtaining the necessary capital or business and that giving notice would prevent the employer's actions from succeeding.

The key phrases are first that the employer was

actively seeking capital or business"; second that, had the employer obtained this capital or business, it "would have enabled the employer" to prevent or forestall the shutdown, and third, that the employer "reasonably and in good faith believed" that giving the notice required would have precluded the employer from obtaining the necessary capital or business that it had a realistic opportunity to obtain. Thus, to avail itself of this defense an employer must prove the specific steps it had taken, at or shortly before the time notice would have been required, to obtain a loan, to issue bonds or stock, or to secure new business. This duty to seek capital or business falls on the employer, not the single site alone, and assumes that the employer lacks the necessary capital or business. Moreover, the employer must show the reasonable basis for its good-faith belief that giving the required notice would have prevented the employer from obtaining the capital or business that the employer had a realistic opportunity to obtain. Finally, the employer also must show that, upon learning that the workplace would be closed, it promptly notified the employees and explained why earlier notice had not been given.

Unforeseeable Business Circumstances. The Conferees recognize that there may be cases in which unforeseeable events necessitate a plant closing or mass layoff and it is not economically feasible to require the employer to give notice and wait until the end of the notice period before effecting the plant closing, or mass layoff. For example, a natural disaster may destroy part of a plant; a principal client of the employer may suddenly and unexpectedly terminate or repudiate a major contract; or an employer may experience a sudden, unexpected and dramatic change in business conditions such as price, cost, or declines in customer orders.

In these situations, the employer is required to give notice as soon as the closing or mass layoff becomes reasonably foreseeable, but the employer is permitted to implement the proposed closing or layoff without waiting until the end of the full notice period.

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5. EXTENSION OF LAYOFF PERIOD (SEC. 332 (C) OF SENATE AMENDMENT, SEC. 6403(C) OF CONFERENCE AGREEMENT)

Senate amendment

The Senate Amendment provides that a layoff of definite duration of less than six months that extends beyond six months shall be treated as a layoff of indefinite duration subject to notification unless (1) the extension is caused by business circumstances not reasonably foreseeable at the time of the initial layoff; and (2) notice is provided as soon as it is reasonably foreseeable that the extension is required.

Conference agreement

The Conference Agreement has eliminated the concept of a layoff of indefinite duration as was provided in the Senate Amendment. Therefore, the Conferees have modified the language of section 6403(c) to conform that section to the simplified definition in section 6402(a)(6). Employers operating under this provision lawfully may postpone

giving notice until some time after a layoff has commenced *only* if they announced when ordering the layoff that the layoff would be for less than six months and if the employer proves that the layoff has been extended due to unforeseeable business circumstances.

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6. DETERMINATION OF EMPLOYMENT LOSS (SEC. 333(C) OF SENATE AMENDMENT, SEC. 6403(D) OF CONFERENCE AGREEMENT)

Senate amendment

The Senate Amendment provides for the determination of a plant closing or mass layoff based on aggregation of smaller employment losses. Under the Amendment, employment losses at a single site for 2 or more groups of employees, each of which is less than 50 employees, but which in the aggregate total at least 50 employees, that occur within a 90-day period, will be considered closing or layoff subject to notification, unless the employer demonstrates the employment losses result from separate and distinct actions and causes and are not an attempt to evade the notice requirements.

Conference agreement

Language has been added to conform this subsection to the definition of mass layoff that appears in section

6402(a)(3). The Conferees wish to clarify that the requirement that a mass layoff of 50 to 499 employees must affect 33 percent of the employees at a particular employment site also applies to this section. The "33 percent" requirement was inadvertently omitted from the language approved by the Senate. Thus, for example, an employer employing 300 workers at a single site which laid off 25 employees on each of four separate occasions within a 90-day period would presumptively be deemed to have implemented a mass layoff of more than 50 employees affecting 33 percent of the workforce. On the other hand, no such presumption would arise where the same employer laid off 25 employees on each of 4 occasions over the same 90-day period, because the "33 percent" requirement would not have been met.

7. EXEMPTIONS (SEC. 334(3), (4) OF SENATE AMENDMENT, SEC. 6404 OF CONFERENCE AGREEMENT)

Senate amendment

The Senate Amendment exempts particular plant closings and mass layoffs from the notice requirements. No notice is required if the closing is a shutdown of a temporary facility or the mass layoff results from the completion of a particular project so long as the affected employees were hired with the understanding that the job was limited to the duration of the facility or project.

The Senate Amendment also exempts from the notice requirement those closings or layoffs that constitute a strike or a lockout.

Conference agreement

As discussed earlier in this Report, the Conference Agreement transforms two exemptions in the Senate Amendments—for sale and relocation of a business—into exclusions from the definition of "employment loss." The Conference Agreement retains the remaining two exemptions as exemptions with the following modifications:

Temporary Facility. The Conference Agreement adds language to clarify that this exception applies either to a closing or to a layoff. In addition, the Agreement clarifies that the exemption from the notice requirement is available where the closing or layoff is the result of the completion of a particular "undertaking," as well as a particular "project." Use of the term "project' in the Senate Amendment had been read by some as precluding its application to certain other termporary activities. The Senate floor debate included discussion of this exemption, and the Conferees felt that clarification of the intent of the Senate provision would be advisable.

There are two basic requirements for this exemption to apply. First, the employees in question must have been hired with the understanding that their jobs would last only until an obviously limited activity of the employer was completed. This condition must have been clearly stated to the employees at the time they begin work. Second, the work must in fact be temporary or limited. The Conferees do not intend that employers be able to avoid the notice requirement by a formal process of periodically telling workers that their jobs will last only until completion of a particular project or undertaking, when both employer and employees

expect and intend to continue the employment relationship indefinitely.

Thus, floor statements by the sponsors of the bill in the Senate indicated that the exemption could apply to ship-building and overhaul projects where employees were hired with the requisite understanding and where the work is in fact only for the duration of a particular project. Although the precise date on which operations will cease sometimes cannot be specified at the beginning of the unertaking, the employees know that when the work is done, their jobs will lapse. Similarly, this exemption also applies where an employer hires employees for a specified and obviously limited term and the employees are informed in writing of the exact date of termination either at the outset or at some other point preceding the 60-day notice period.

Lockout. The Senate bill exempts closings and layoffs from the notice requirement when they constitute a strike or lockout. A lockout occurs when, for tactical reasons relating to collective bargaining, an employer refuses to utilize some or all of its employees for the performance of available work. The Conference Agreement clarifies that only lockouts not undertaken for the purpose of evading the notice requirements qualify for the exemption. An employer may not, for example, shut down an establishment and evade the notice requirement by calling the shutdown a lockout.

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8. ADMINISTRATION AND ENFORCEMENT OF NOTICE REQUIREMENTS (SEC. 333(A), (B) OF

SENATE AMENDMENT, SEC. 6405, 6408 OF CONFERENCE AGREEMENT)

Senate amendment

The Senate Amendment establishes enforcement mechanisms against an employer which fails to meet the notice requirements. An employee who suffers an employment loss and who does not receive timely notice (either directly or through the employee's representative) may bring a civil action against the employer. The employer would be liable for back pay for each day of the violation plus the cost of related fringe benefits for each day of the violation minus any earnings or related fringe benefits received from the employer during the violation period.

If the employer does not provide timely notice to the unit of local government, the employer would be subject to a civil penalty equal to $500 for each day of the violation. If more than one unit of local government has jurisdiction over the area in which the closing or layoff will occur, the employer must notify only the unit of local government to which the employer paid the highest taxes for the year preceding the year when the notice is required.

The Senate Amendment provides that a court may reduce an employer's liability to employees or an employer's penalty to the unit of local government if that employer demonstrates that it acted in good faith and had reasonable grounds for believing it was not violating the notice requirements.

The Senate Amendment includes venue and attorneys'

fees provisions. A person seeking to enforce the liability provisions of this part may sue, individually or on behalf of others similarly situated, in any U.S. district court in a district in which the violation occurred or in which the employer transacts business. A court, in addition to any judgment awarded to plaintiffs under this section, may allow a reasonable attorneys' fee.

The remedies provided for in the Senate Amendment are the exclusive remedies available for violation of the notice requirements.

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Conference agreement

The Conference agreement adopts the Senate provision with the following modifications:

Each day of violation. The Senate Amendment provides that an employer which violates the notice provisions of section 6403 is liable for back pay and a civil fine for "each day of violation" The Conferees wish to clarify that "each day of violation" is limited to the requisite notice period. Thus, the maximum violation period is 60 days, and it could be less depending upon the amount of notice given by the employer. For example, if the employer provides 20 days notice, then the maximum violation period for purposes of calculating back pay awards or civil fines would be 40 days. ("Violation

period" refers to the period of time after a shutdown or layoff in violation of this Act, and extends for the number of days that notice was required but not given.)

Damage payments to employees. The Conference agreement modifies the Senate Amendment language pertaining to offset. The conferees wish to clarify that for each day of violation, an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff, as set forth in section 6405(a)(1). The Conferees also intend that an employer may satisfy its liability with respect to benefits by paying the cash value of such benefits for the period of violation, subject to the offset provisions in section 6405(a)(2).

Under 6405(a)(2), the amount owed by the employer may be reduced through cetain payments made by the employer for the period of the violation. An offset would occur if the employer's mass layoff involved a reduction in hours of 75 percent for 6 consecutive months but the employer continued to pay the affected employees 25 percent of their wages. The offset provision also would apply if an employer offers employees a payment (in the absence of any legal obligtion), in a voluntary and unconditional effort to ease the burden of termination or simply as a gesture of goodwill. (The Conferees wish to note here that damages are fully satisfied when an employer makes the payment prescribed in section 6405(3)). If the employer continues to make payments to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan), which are attributable to the employee for the violation period, the payments made also would offset the back pay remedy. Finally, with respect to the portion of benefit liability arising

from a defined benefit pension plan, an employer could satisfy that portion of its liability by crediting the employee with service for all purposes for the period of the violation.

By contrast, payments owing because of written or oral agreement, and made on account of the employment loss, would not offset the back pay remedy. Such payment may include severance pay, pension benefits or any other kind of benefit that an employee is entitled to receive. These are benefits that are payable as compensation for past services because of layoff or shutdown has occurred, whether or not the terms of the layoff or shutdown actually violate the Act. In addition, they are benefits that an employee would not receive if employment had continued.

Further, the only payments that may offset the back pay remedy are those made by the violating employer. Wages received from another employer, or unemployment compensation payments received from the State, may not be used to offset the remedy.

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Damage payments to local governments. The Conferees intend that employers which violate the notice requirements with respect to the affected unit of local government be subject to a civil penalty of up to $500 per day of violation. Thus, the maximum penalty payable to a local government is $30,000. In the event that a violation is found, a court in determining the amount of the penalty may take into account

the severity of the violation, the employer's size, and the employer's ability to pay such a penalty. The Conferees further intend to provide an incentive and a mechanism for employers to satisfy their obligation to their employees in the event they fail to provide 60 days advance notice to their employees. An employer will be relieved of the $500-a-day penalty to the local unit of government if it fully and promptly satisfies any financial liability to its employees under section 6405(a)(1). In order to avoid the payment to the unit of local government, an employer must complete full payment to its employees within 3 weeks from the point at which it orders a shutdown or layoff.

In addition, the Conferees agree that the Secretary of Labor should be authorized to promulgate regulations to ease administration and enforcement of the WARN Act. The Conference Agreement recognizes that interpretive regulations could play a constructive role in the implementation of this legislation.

Although the Deparatment of Labor does not have an enforcement role, the Agreement authorizes the Secretary of Labor to promulgate regulations as he or she deems necessary. At a minimum, these regaulations must prescribe standards governing the service of notice to affected employees. The Conferees intend that an employer be diligent in its effort to notify a representative of employees or the employees themselves. At the same time, the Conferees do not expect an employer to go to extraordinary and unreasonble lengths to notify each and every employee. For example, a mailing to the current addresses of employees might suffice, even though a few employees might have moved unbeknownst to the employer.

9. RELATION TO OTHER RIGHTS (SEC. 335 OF SENATE AMENDMENT; SEC. 6406 OF CONFERENCE AMENDMENT)

Senate amendment

The Senate Amendment provides that the rights and remedies provided under the advance notification provisions are in addition to any other contractual or federal statutory rights and remedies available to affected employees.

Conference agreement

The Conference Agreement provides that with one exception the rights and remedies provided under the advance notification provisions do no preempt or displace rights and remedies provided under other statutes or under contractual agreements. The Conferees are aware that many legal issues related to plant closings and mass layoffs currently may be addressed under collective bargaining agreements and some of these same issues also may be dealt with under state or other federal law. *See, e.g., Fort Halifax, Packing Company v. Coyne,*[10] 107 S. Ct. 2211 (1987) (ERISA does not preempt state law prescribing severance pay). The Conferees intend that the effect of these other laws and contracts should not be disturbed by the new federal provision. The only qualification to this rule involves the length of notice before a

[10] 482 U.S. 1, 96 L.Ed.2d I.

plant shutdown, the 60-day requirement contained in this bill will run concurrently with the 90-day requirement under state law. Similarly, if a collective bargaining agreement requires that an employer give 120 days notice before closing a plant, the new 60-day requirement will run concurrently with the longer contractual notice period.

10. SENSE OF THE CONGRESS ON NOTICE (SEC. 336 OF SENATE AMENDMENT, SEC. 6407 OF CONFERENCE AGREEMENT)

Senate amendment

The Senate Amendment expresses the sense of Congress that an employer not required by this Act to provide advance notice of a plant closing or mass layoff is encouraged to provide advance notice irrespective of its obligations under federal law.

Conference agreement

The Conference Agreement adopts the Senate provision.

11. EFFECT ON OTHER LAWS (SEC. 338 OF SENATE AMENDMENT, SEC. 6409 OF CONFERENCE AGREEMENT)

Senate amendment

The Senate Amendment provides that an employer attempting in good faith to comply with the advance notice provisions of the Act cannot be found in violation of the National Labor Relations Act or the Railway Labor Act.

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Conference agreement

The Conference Agreement adopts the Senate provision.

12. EFFECTIVE DATE (SEC 337 OF SENATE AMENDMENT, SEC. 6410 OF CONFERENCE AGREEMENT)

Senate amendment

The Senate Amendment provides that the advance notice requirements established by the Act shall become effective six months and two days after the date of enactment.

Conference agreement

The Conference Agreement adopts the Senate provision with two minor changes. The effective date of the advance notice provisions is changed to six months after the date of enactment. In addition, the Conference Agreement provides that the authority granted to the Secretary of Labor to prescribe regulation to carry out the advance notice provision is effective upon the date of enactment.

PART F—NATIONAL SCIENCE FOUNDATION UNIVERSITY INFRASTRUCTURE

1. Section 571 of the bill amends Title VII of the Higher

Education Act (HEA) by adding a new Part I, the College and University Research Facilities and Instrumentation Modernization Program (hereafter referred to as the "Program"). The Senate bill has no comparable provision.

House recedes with an amendment creating an academic research facilities modernization program and a college science instrumentation program at the National Science Foundation.

Title I (b)

The conferees mean by the term "independent non-profit research institution" those institutions in that category that have traditionally been eligible for NSF grants, such as research institutes. The conferees expect NSF to specify further which institutions will be eligible for facilities grants as part of the interim guidelines to be published in the Federal Register pursuant to sub-section (d).

Title I (c)

The conferees agree that proposals submitted under Title I will be subject to merit review following NSF's current procedures. The merit review panels must include representatives from a mix of institutions reflective of the variety of U.S. institutions eligible for receiving funding under this program. The conferees are particularly concerned that universities that have not traditionally been large recipients of NSF grants be represented on the panels.

In determining the appropriate non-federal share for an institution, NSF should take into account the relative

financial strength of the institution. However, under no circumstances may the non-federal share be less than 50 percent. As minority institutions may have difficulty raising funds and may have small endowments, NSF may allow such institutions to provide a portion of their 50 [STOP]

Supreme Court, U.S.
FILED

(3)

NO. 97-86 JUL 14 1997

OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1997

ROBBIE A. VIATOR, DONIE R. HARMON, PAMELA S. BARBRY, RICHARD D. KEITH; PATRICIA DOUGLAS; ANGELA ROMERO; DONALD FONTENOT; GERALD LEE; ODELIA LOUISE TATE; DINA LOPEZ; NANCY H. BIMLE; MICHAEL JOSEPH TRAHAN; ANGELA R. LOPEZ; STEVEN PAUL JOHNSON; EVERETT PAUL MARSHALL; GARY CHESTER; KEVIN B. MATTE; CYNTHIA L. ROUGEAU; DAVID LEE PATTON; BRADLEY FONTENOT: TRACY BARNES: FRANK BERLIN: AND KATHLEEN CRICH
Individually and on behalf of all persons similarly situated
Petitioners

V.

DELCHAMPS, INCORPORATED
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX VOLUME II

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APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Plaintiff's Exhibit P-4

ROBBIE A. VIATOR, PAMELA S. BARBRY, DONIE R. HARMON, Individually and on Behalf of All Persons Similarly Situated	:	CIVIL ACTION NO. 95-0797 JUDGE TRIMBLE MAGISTRATE
VERSUS	:	JUDGE WILSON
DELCHAMPS, INC.	:	

AFFIDAVIT OF ROBBIE A. VIATOR

STATE OF LOUISIANA
PARISH OF CALCASIEU

BEFORE ME, the undersigned authority, personally came and appeared ROBBIE A. VIATOR, who, upon being sworn, deposed and said as follows:

1.

He is a plaintiff in the above captioned case.

2.

He has personal knowledge of the facts set forth in this affidavit.

3.

On February 6, 1995, he attended a meeting at the former Delchamps, Inc. #105 store (Highway 14, Lake Charles). Present with him at this meeting were other employees of the former Delchamps, Inc. #105 store and employees of both the former Delchamps, Inc. #104 store (Nelson Road, Lake Charles) and the formerDelchamps, Inc. #106 store (Maplewood Drive, Sulphur).

4.

At the meeting held on February 6, 1995, it was verbally announced that the Delchamps, Inc. stores in greater Lake Charles area would be closed as of February 25, 1995. Among those representing Delchamps, Inc. at the meeting were Hugh VanHooser, Tom Trebesh, and Wayme Wiggins.

5.

A few days after the meeting on February 6, 1995, he and other former Delchamps, Inc. #105 store employees were verbally informed by Bryan Bradley, store manager of former Delchamps, Inc. #104, #105 and #106 stores, that although the then Delchamps, Inc. #105 store would close its doors on February 25, 1995, it would be necessary that employees work after the date of closure for an unspecified period of time to complete merchandise transfers.

6.

The actual date the former Delchamps, Inc. #104, #105, and #106 stores closed was February 25, 1995; however, the last date hourly employees worked at the former Delchamps, Inc. #105 store was February 27, 1995. The last date he worked at the former Delchamps, Inc. #105 store was also February 27, 1995.

7.

He was never given written notice of Delchamps, Inc.'s closing of the stores in the greater Lake Charles area or of his simultaneous lay-off in connection with the closures.

8.

He knows of no employee of the former Delchamps, Inc. #104, #105, or #106 stores who received written notice of the store closures in the greater Lake Charles area or simultaneous layoffs in connection the closures.

9.

He was told by Bryan Bradley, store manager of former Delchamps, Inc. #104, #105, and #106 stores, that the transfers offered to employees required that the employees move from the greater Lake Charles area.

10.

The following is a list of sites to which some employees of the former Delchamps, Inc. #104, #105, and #106 stores

transferred to and the approximate distances from Lake Charles to the city of each site (using Rand McNally Road Atlas):

Store#	City	Approximate Distance from Lake Charles in Miles
35	Tuscaloosa	544
97	Opelousas	96
107	Abbeville	99
109	Crowley	53
118	LaPlace	185
123	Lafayette	76
128	Baton Rouge	125
307	Tuscaloosa	544

11.

All of these possible transfer sites were beyond the commuting distance allowed by Delchamps, Inc.

12.

Prior to closure, whenever there was a shortage of a stock item at the then Delchamps, Inc. #104, #105, or #106 stores and the item was not expected to be restocked in the immediate future through stock receiving, it was customary practice to utilize stock surplus from one of the other stores in the greater Lake Charles area.

13.

Prior to closure, whenever there was a shortage of personnel at the then Delchamps, Inc. #104, #105, or #106 stores, it was customary practice to utilize temporarily personnel from one of the other stores in the greater Lake Charles area.

14.

The employees of the former Delchamps, Inc. #104, #105, and #106 stores were non-union.

/s/ Robbie A. Viator
ROBBIE A. VIATOR

SWORN TO AND SUBSCRIBED before me this 18th day of January, 1996, at Lake Charles, Louisiana.

/s/McCain
NOTARY PUBLIC

APPENDIX I

DELCHAMPS, INC.
PLAN WORKSHEET FOR FISCAL YEAR 1995
FISCAL 1994 PLAN, ANNUALIZED YEAR TO DATE, AND MOST RECENT 12 MONTHS
SALES (000) - CONTROLLABLE EXPENSES WHOLE DOLLARS

LOCATION: 104

DEF EXHIBIT B

A-104

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
SALES													
Grocery													
'95 Plan	353	289	287	362	300	302	351	251	275	348	296	296	3748
Pri. 12 Mo.	349	288	283	346	288	300	346	271	275	354	286	357	3745
Ann. '94	350	280	280	350	280	280	350	280	280	350	280	280	3640
Plan '94	340	258	284	360	300	300	350	295	295	360	296	296	3734

LOCATION: 104

ACCOUNT NAME / MARKET	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
'95 Plan	82	64	68	80	61	72	82	64	64	78	57	57	829
Pri. 12 Mo.	79	63	66	82	73	70	79	62	64	83	65	81	866
Ann. '94	80	64	64	80	64	64	80	64	64	80	64	64	832
Plan '94	67	47	56	78	61	61	72	56	56	78	57	57	746
Produce													
'95 Plan	43	36	35	45	36	32	42	33	31	38	34	34	439
Pri. 12 Mo.	40	35	32	37	28	29	37	30	31	42	37	43	420
Ann. '94	40	32	32	40	32	32	40	32	32	40	32	32	416
Plan '94	43	30	34	43	36	36	43	34	34	43	34	34	444
Deli/Bake													
'95 Plan	17	14	14	17	17	16	16	12	12	13	14	14	176
Pri. 12 Mo.	16	14	13	17	13	14	18	14	13	17	14	17	181
Ann. '94	15	12	12	15	12	12	15	12	12	15	12	12	156
Plan '94	17	10	14	17	17	17	14	14	14	17	14	14	179

LOCATION: 104

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
Seafood													
'95 Plan													
Pri. 12 Mo.													
Ann. '94													
Plan '94													
H & BC													
'95 Plan	21	13	15	17	12	22	21	12	17	18	13	13	198
Pri. 12 Mo.	16	13	14	22	19	20	20	16	17	20	16	16	210
Ann. '94	20	16	16	20	16	16	20	16	16	20	16	16	208
Plan '94	14	11	12	16	12	12	16	13	13	16	13	13	161
Floral													
'95 Plan	6	3	5	6	4	8	6	4	6	3	4	4	59
Pri. 12 Mo.	4	3	4	6	4	6	5	9	7	7	8	5	67
Ann. '94	5	4	4	5	4	4	5	4	4	5	4	4	52
Plan '94	5	4	4	5	4	4	5	4	4	5	4	4	52

LOCATION: 104

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
Total Sales													
'95 Plan	522	419	424	527	430	452	518	410	405	498	418	419	5442
Pri. 12 Mo.	504	415	412	509	426	439	505	402	407	522	426	518	5487
Ann. '94	510	408	408	510	408	408	510	408	408	510	408	408	5304
Plan '94	486	360	404	519	430	430	500	416	416	519	418	418	5316
Pri. 12 Mo.	132-	155-	17-	122-	263-		77-	32-	287-	303-	168-	15-	1571-
Ann. '94	140-	112-	112-	140-	112-	112-	140-	112-	112-	140-	112-	112-	1456-
Plan '94	200-	200-	200-	200-	200-	200-	200-	200-	200-	200-	200-	200-	2400-
Bad Ck. Coll.Fees													
'95 Plan	400-	406-	480-	400-	430-	400-	400-	400-	400-	400-	425-	425-	2300-
Pri. 12 Mo.	391-	554-	375-	450-	310-	285-	265-	450-	195-	495-	240-	495-	4605-
Ann. '94	435-	348-	348-	435-	348-	348-	435-	348-	348-	435-	348-	348-	4524-
Plan '94	400-	400-	400-	400-	400-	400-	400-	400-	400-	400-	400-	400-	4800-

LOCATION: 104

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
Bad Ck. Coll.Expse													
'95 Plan	178	132	148	180	150	155	180	140	135	170	145	145	1858
Pri. 12 Mo.			569	226	162	143	235	186	125				1646
Ann. '94	210	168	168	210	168	168	210	168	168	210	168	168	2184
Plan '94	178	132	148	190	157	157	183	152	152	190	153	153	1945

Total Cont. Expense	JUL	AUG	SEP	OCT	NOV	DEC	
'95 Plan	59,004	46,220	45,466	59,065	45,686	47,704	
	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
	58,981	45,370	45,395	59,548	45,412	45,433	603,198

	JUL	AUG	SEP	OCT	NOV	DEC	
Pri. 12 Mo.	53652	44174	44576	56637	43957	45792	
	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
	55167	43160	42207	54852	43829	54393	582,396

LOCATION: 104

	JUL	AUG	SEP	OCT	NOV	DEC	
Ann. '94	55035	44028	44028	55035	44028	44028	
	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
	55035	44028	44028	55035	44028	44028	572,364
	JUL	AUG	SEP	OCT	NOV	DEC	
Plan '94	56576	43422	46712	58186	48726	49341	
	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
	57423	46770	46770	59101	47119	47219	607,365

DELCHAMPS, INC.
PLAN WORKSHEET FOR FISCAL YEAR 1995
FISCAL 1994 PLAN, ANNUALIZED YEAR TO DATE, AND MOST RECENT 12 MONTHS
SALES (000) - CONTROLLABLE EXPENSES WHOLE DOLLARS

LOCATION: 105

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
SALES													
Grocery													
'95 Plan	234	187	187	234	187	187	234	187	234	234	187	187	2479
Pri. 12 Mo.	342	277	272	288	224	223	251	191	186	336	271	346	3208
Ann. '94	290	232	232	290	232	232	290	232	232	290	232	232	3016
Plan '94	384	310	305	379	308	322	378	298	310	381	308	314	3997

LOCATION: 105

ACCOUNT NAME / MARKET	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
'95 Plan	70	56	56	70	56	56	70	56	70	70	56	56	742
Pri. 12 Mo.	102	84	89	96	88	80	75	58	60	99	81	104	1017
Ann. '94	95	76	76	95	76	76	95	76	76	95	76	76	988
Plan '94	112	90	89	110	89	94	110	86	90	111	89	91	1161
Produce													
'95 Plan	27	22	22	27	22	22	27	22	27	27	22	22	289
Pri. 12 Mo.	41	35	32	32	23	23	27	21	20	38	34	40	366
Ann. '94	30	24	24	30	24	24	30	24	24	30	24	24	312
Plan '94	40	33	32	40	32	34	40	31	32	40	32	33	419
Deli/Bake													
'95 Plan	24	19	19	24	19	19	24	19	24	24	19	19	253
Pri. 12 Mo.	33	27	27	32	21	23	24	20	20	31	27	31	315
Ann. '94	30	24	24	30	24	24	30	24	24	30	24	24	312
Plan '94	34	28	27	34	27	29	34	26	28	34	27	28	356

LOCATION: 105

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
Seafood													
'95 Plan	6	5	5	6	5	5	6	5	6	6	5	5	65
Pri. 12 Mo.	6	6	6	7	6	5	7	7	6	7	5	6	75
Ann. '94	5	4	4	5	4	4	5	4	4	5	4	4	52
Plan '94	7	6	6	6	5	6	6	7	6	7	5	6	73
H & BC													
'95 Plan	25	20	20	25	20	20	25	20	25	25	20	20	265
Pri. 12 Mo.	29	24	24	33	30	36	35	22	22	33	27	31	345
Ann. '94	35	28	28	35	28	28	35	28	28	35	28	28	364
Plan '94	37	30	30	36	30	31	36	29	30	37	30	30	386
Floral													
'95 Plan	4	3	3	4	3	3	4	3	4	4	3	3	41
Pri. 12 Mo.	4	3	3	4	3	4	3	6	3	5	7	4	49
Ann. '94	5	4	4	5	4	4	5	4	4	5	4	4	52
Plan '94	5	4	4	5	4	4	5	7	4	5	5	4	56

LOCATION: 105

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
Total Sales													
'95 Plan	390	312	312	390	312	312	390	312	390	390	312	312	4134
Pri. 12 Mo.	557	456	453	492	394	395	423	324	317	550	452	562	5375
Ann. '94	490	392	392	490	392	392	490	392	392	490	392	392	5096
Plan '94	619	501	493	610	495	520	609	484	500	615	496	506	6448
Pri. 12 Mo.	580-	159-	362-	584-	184-	80-	159-	492-	55-	691-	517-	591-	4454-
Ann. '94	340-	272-	272-	340-	272-	272-	340-	272-	272-	340-	272-	272-	3536-
Plan '94	600-	480-	480-	600-	480-	480-	600-	480-	480-	600-	480-	480-	6240-
Bad Ck. Coll.Fees													
'95 Plan	585-	462-	462-	557-	462-	482-	557-	462-	557-	557-	462-	462-	6067
Pri. 12 Mo.	951-	787-	704-	753-	413-	270-	915-	500-	435-	855-	976-	771-	8330-
Ann. '94	735-	588-	588-	735-	588-	588-	735-	588-	588-	735-	588-	588-	7644-
Plan '94	1175-	940-	940-	1175-	940-	940-	1175-	940-	940-	1175-	940-	940-	12220-

LOCATION: 105

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
Bad Ck. Coll.Expse													
'95 Plan	117	92	92	115	92	97	115	92	115	115	92	92	1226
Pri. 12 Mo.			591	221	156	128	206	130	102				1534
Ann. '94	195	156	156	195	156	156	195	156	156	195	156	156	2028
Plan '94	227	183	180	223	181	190	223	177	183	225	182	185	2359

Total Cont. Expense	JUL	AUG	SEP	OCT	NOV	DEC	
'95 Plan	75463	61537	60639	75338	60524	73162	
	JAN	FEB	MAR	APR	MAY	JUN	
	64180	71652	75338	76441	60434	60434	

	JUL	AUG	SEP	OCT	NOV	DEC	
Pri. 12 Mo.	81290	65560	67292	80233	64854	65718	
	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
	78407	61169	62009	78306	63070	79316	847224

LOCATION: 105

	JUL	AUG	SEP	OCT	NOV	DEC	
Ann. '94	80320	64256	64256	80320	64256	64256	
	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
	80320	64256	64256	80320	64256	64256	835328
	JUL	AUG	SEP	OCT	NOV	DEC	
Plan '94	87304	71934	69805	86223	70026	74204	
	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
	86258	68634	70523	88095	70068	71234	914308

DELCHAMPS, INC.
PLAN WORKSHEET FOR FISCAL YEAR 1995
FISCAL 1994 PLAN, ANNUALIZED YEAR TO DATE, AND MOST RECENT 12 MONTHS
SALES (000) - CONTROLLABLE EXPENSES WHOLE DOLLARS

LOCATION: 106

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
SALES													
Grocery													
'95 Plan	364	291	283	283	228	228	283	226	226	283	226	226	3147
Pri. 12 Mo.	447	375	361	433	368	367	390	288	302	442	349	449	4572
Ann. '94	425	340	340	425	340	340	425	340	340	425	340	340	4420
Plan '94	428	396	386	476	400	420	487	384	345	423	328	324	4797

LOCATION: 106

ACCOUNT NAME / MARKET	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
'95 Plan	91	73	71	71	57	57	71	56	56	71	56	56	786
Pri. 12 Mo.	105	90	92	111	97	92	91	65	70	102	83	104	1102
Ann. '94	105	84	84	105	84	84	105	84	84	105	84	84	1192
Plan '94	96	86	88	106	96	95	112	83	74	96	70	70	1072
Produce													
'95 Plan	37	30	29	29	23	23	29	23	23	29	23	23	321
Pri. 12 Mo.	51	44	38	42	35	35	39	27	29	51	45	55	492
Ann. '94	45	36	36	45	36	36	45	36	36	45	36	36	468
Plan '94	42	40	37	46	35	37	47	38	36	46	32	32	468
Deli/Bake													
'95 Plan	22	17	17	17	13	13	17	13	13	17	13	13	125
Pri. 12 Mo.	31	26	25	30	23	24	25	18	18	28	25	30	303
Ann. '94	30	24	24	30	24	24	30	24	24	30	24	24	312
Plan '94	27	22	22	28	23	27	28	24	20	27	23	21	292

LOCATION: 106

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
Seafood													
'95 Plan													
Pri. 12 Mo.													
Ann. '94													
Plan '94													
H & BC													
'95 Plan	16	13	12	12	10	10	12	10	10	12	10	12	139
Pri. 12 Mo.	16	14	16	23	21	24	20	14	15	21	17	17	220
Ann. '94	20	16	16	20	16	16	20	16	16	20	16	16	208
Plan '94	16	17	15	18	18	19	21	19	16	19	16	12	206
Floral													
'95 Plan	5	4	4	4	3	3	4	3	3	4	3	3	43
Pri. 12 Mo.	6	4	4	6	5	6	4	9	5	8	11	6	74
Ann. '94	5	4	4	5	4	4	5	4	4	5	4	4	52
Plan '94	5	4	5	6	5	7	6	11	5	8	10	4	76

LOCATION: 106

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
Total Sales													
'95 Plan	535	428	416	416	334	334	416	331	331	416	331	331	4621
Pri. 12 Mo.	656	555	537	646	549	548	569	423	440	651	529	662	6763
Ann. '94	630	504	504	630	504	504	630	504	504	630	504	504	6552
Plan '94	614	565	553	680	577	605	701	559	496	619	479	463	6911
	160	128	125	125	100	100	125	99	99	125	99	99	1384
Pri. 12 Mo.	137-	135-	318-	91-	243-	219-	404-	599-	360-	220-	241-	366-	3333-
Ann. '94	320-	256-	256-	320-	256-	256-	320-	256-	256-	320-	256-	256-	3328-
Plan '94	260-	220-	190-	260-	220-	220-	260-	220-	220-	260-	220-	220-	2770
Bad Ck. Coll.Fees													
'95 Plan	268-	214-	208-	208-	167-	167-	208-	166-	166-	208-	166-	166-	2312
Pri. 12 Mo.	840-	540-	540-	453-	261-	445-	515-	580-	270-	786-	605-	654-	6489-
Ann. '94	570-	456-	456-	570-	456-	456-	570-	456-	456-	570-	456-	456-	5928-
Plan '94	360-	300-	300-	360-	300-	300-	360-	300-	300-	360-	300-	300-	3840-

LOCATION: 106

ACCOUNT NAME	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
Bad Ck. Coll.Expse													
'95 Plan	160	128	125	125	100	100	125	99	99	125	99	99	1384
Pri. 12 Mo.			782	267	217	166	259	168	144				2003
Ann. '94	255	204	204	255	204	204	255	204	204	255	204	204	2652
Plan '94	225	207	202	249	211	221	257	205	181	227	175	169	2529

Total Cont. Expense	JUL	AUG	SEP	OCT	NOV	DEC	
'95 Plan	61218	49633	48925	56231	45093	45792	
	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
	56334	45044	45059	57208	45139	45259	600935

	JUL	AUG	SEP	OCT	NOV	DEC	
Pri. 12 Mo.	63101	52127	51906	64563	50694	50802	
	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
	59383	43993	45184	62419	51452	62669	658293

LOCATION: 106

	JUL	AUG	SEP	OCT	NOV	DEC	
Ann. '94	61770	49416	49416	61770	49416	49416	
	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
	61770	49416	49416	61770	49416	49416	642408

	JUL	AUG	SEP	OCT	NOV	DEC	
Plan '94	61662	55156	55124	66886	56286	59174	
	JAN	FEB	MAR	APR	MAY	JUN	TOTAL
	68770	54622	50392	62016	48250	48064	686402

APPENDIX J

(p.1) ORIGINAL

DEPOSITION OF
WAYNE WIGGINS

ROBBIE, A. VIATOR, PAMELA S.
Plaintiff

VERSUS NO. 95-0797

DELCHAMPS, INC.
Defendant

UNITED STATES DISTRICT COURT

LAFAYETTE-OPELOUSAS DIVISION

WESTERN DISTRICT OF LOUISIANA

MARCH 18, 1996 1:00P.M.

AT THE OFFICE OF
VOORHIES & LABBE
700 ST. JOHN STREET
LAFAYETTE, LOUISIANA

NAT DOUGET COURT REPORTERS
Steno and Video Reporting
P O Box 3226
420 Pujo St (70601)
Lake Charles, LA 70602-3226
318/433-0725 FAX 318/433/-5672
800/259-9900 FAX 800/259-5672

EXHIBIT E

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the meat department. (p.7)

Q. So you began with Delchamps then, about 1981 or — what year?

A. Yes.

Q. And you've been employed with them ever since you got out of school?

A. Yes.

Q. Since you've been district manager, have you been district manager of what district, sir?

A. District eight (8).

Q. You were first promoted to that position when?

A. Four (4) years ago.

Q. You don't remember the month?

A. No, I do not remember the month.

Q. When you were store manager, sir, what store were you?

A. The last store manager, I was the store manager at West Covington, Louisiana.

Q. Who was the district manager before you in district eight (p.8)?

A. Jay Woodard.

Q. Is he with the Company still?

A. No.

Q. Mr. Wiggins, do you know that store number 104 and store number 106 and store number 105 in the (p.8) greater Lake Charles area were all leased first during the course of 1984?

A. No, I don't know the exact lease date. No.

Q. Do you know, sir, that when all three (3) of those stores were first opened that they were each thirty-three thousand, three hundred eighty-seven (3,387) square feet?

A. No, I do not know that.

Q. Do you know when those three (3) stores were first opened, whether they were all equipped with the same equipment and fixtures?

A. No, I do not know that.

Q. So, you don't know anything about the original leases of these three (3) stores?

A. No.

Q. Do you know, sir, what year there was an expansion of store number 105?

A. No.

Q. Mr. Wiggins, would it be a fair statement to say that the grocery business is a low profit margin type of business?

A. Yes.

Q. Can you tell me, sir, what the profit margin of Delchamps, Inc. is, on its grocery stores?

A. On just the grocery side or — we're looking at (p.9)twenty-five percent (25%) gross profit margin.

Q. No. I'm talking about what you net, the net profit.

A. I do not know that exact number.

Q. Okay. What do you mean by just on the grocery side? I'm talking about the whole operation.

A. I do not know the exact numbers as far as the whole operation.

Q. Have you ever heard anyone say that the net profit is one (1), maybe two percent (2%)?

A. We've — yes, I've heard that before, as far as pennies, making a penny on the dollar.

Q. That Delchamps, Inc. makes somewhere between one (1) cent and two (2) cents on a dollar, of sales?

A. I've heard that said before, yes.

Q. Who have you heard that said from?

A. Zone manager.

Q. And who is the zone manager?

A. At that time, Bill Kruse.

Q. An what time are we talking about?

A. Within the last year.

Q. Was that a meeting or something?

A. Basic conversation. (p.9)

Q. What was the context of that conversation?

A. I do not recall.
(p.10)
Q. Did he state that as being a historical percentage of what the profit on a dollar of sales was?

A. I don't remember exactly.

Q. Sir, do you know what the term shrinkage means in the context of a grocery operation?

A. Yes.

Q. Would you tell me what that term means?

A. Shrink has been explained to me in the past, as anything that was received through the back door that did not go through the check out.

Q. So, it's the difference between the product purchased by Delchamps and the product actually sold by Delchamps?

A. Yes.

MR. TETE:

Let's go off the record for a second.

I need to find something.

(OFF THE RECORD)

EXAMINATION BY MR. TETE: (p.10)

Q. Would it be a fair statement to say, sir, that one of your responsibilities as a district manager was to keep the shrinkage level to a minimum?

A. Yes.

Q. Do you know how many dollars of merchandise (stop)
(p.16)
Q. And it would be sometime in '92 that you became district manager?

A. Yes.

Q. In response to some interrogatories, we've been given a management guide. It's been marked as "Exhibit D" in

Response to Interrogatories. For purposes of this deposition, I'd like to mark it as "Exhibit #1", and ask you to review that for a moment.

A. (Reviewing document)

Q. Does this fairly state what your responsibilities as a district manager were?

A. Yes.

Q. Let's go over the various areas. Where it states that you're responsible for maintaining stores according to standards. What standards are we referencing?

A. Delchamps' standards as far as cleanliness, well stocked stores.

Q. Anything else? (16)

A. No, sir.

Q. In reference to carrying out sales plans, what were your responsibilities?

A. Reading it and following it, seeing that the store manager does.
(p.17)
Q. Expense control.

A. Any expense that the store may incur; controlling lights, whether it'd be overtime, any controllable expense.

Q. Controlling lights, what do you mean by that?

A. Well, you can cut a light off rather than leaving it on. It can help out. Whether it'd be supplies in a department.

Q. So you were responsible for keeping overtime down?

A. Yes. In my area.

Q. Okay. Any other examples of how you're responsible for expense control?

A. None that I can think of.

Q. Shrinkage control. How did you carry out your responsibility on shrinkage control?

A. We would check each invoice, have the store manager check it. I work directly with the store manager. Giving the store manager any type of assistance I could to make sure he did get everything that he was charged for in all departments and so forth, if he happened to have a shrink problem. Also, you know, making sure everything got rang up at the check out. Explaining to him what he might need to look for.
(stop)
(p.19)
the stores?

A. Hour to two (2) hours.

Q. Okay.

A. Depending on store conditions and what I had to cover

with each individual store manager.

Q. And what would you do during the course of this one (1) to two (2) hours?

A. We would walk the entire store, visit with any associates that were working in the store, just to say "Hello". I would check the store conditions, overall store conditions.

Q. And after walking the store, would you discuss with management what steps needed to be taken to bring the store in compliance with Delchamps' policies?

A. Yes.

Q. Would you review the schedule, the manpower schedule for a given period of time?

A. Yes, on occasions.

Q. Your responsibility included, according to this management guide, determining manpower requirements necessary to carry out the work; correct?

A. Yes.

Q. And your responsibility included recommending changes in manpower requirements? (stop)
(p.23)
A. Yes.

Q. Would it be a fair statement to say that Delchamps, Inc. incurs less unemployment tax by keeping the number of employees down and increasing the hours of each employee?

A. I'm not understanding what you're asking me.

Q. Would there be a higher unemployment tax cost associated with having two (2) part-time employees each work fifteen (15) hours as opposed to one (1) part-time employee working thirty (30) hours?

A. I don't know that.

Q. You don't know the answer to that?

A. No.

Q. You've indicated that if a part-time employee was only scheduled to work ten (10) to fifteen (15) hours at what you considered his home store, that that particular employee could work at one of the other stores in the greater Lake Charles area to get additional hours if there was a need in (p.23) that other store for some help; correct?

A. Yes.

Q. Tell me how that process would work whereby a part-time employee would be allowed to work in one of the other stores.

A. Another store manager may call that individual (p.24) store manager and say "Look, I had two (2) people quit today, do you have a part-time stock clerk you could send me to help

me finish my stock truck"?, until he hired someone else to replace that person at that store.

Q. Any other circumstances, sir?

A. It could happen just like that in any department.

Q. What about with respect to when personnel at one store were on vacation, not working for a period of time, would that be another instance of when a manager of one store in the greater Lake Charles area would call upon the manager of another store to allow personnel to come over?

A. Yes.

Q. And would the same hold true if the personnel at one store were absent from employment because of sickness?

A. Yes.

Q. I believe you stated another instance when a part-time employee would be allowed to work in one of the other stores in the Lake Charles area would be to accommodate a part-time employee's school schedule? (p.24)

A. No. That's not what I stated.

Q. Tell me what you stated again.

(p.26) preform business?

A. No.

Q. You don't agree with that statement?

MR. SCHWARTZ:

You need to answer audibly, Mr. Wiggins.

THE WITNESS:

I'm sorry?

MR. SCHWARTZ:

Yes or no.

A. Could you ask your question again? I mean, I'm not sure —

EXAMINATION BY MR. TETE:

Q. Yes. Strike that question. Aside from part-time personnel, were there circumstances under which full-time personnel employed in one of the stores in the greater Lake Charles area would work at another store in the greater Lake Charles area?

A. Yes.

(p.26)
Q. Under what circumstances did that occur, sir?

A. The same as we spoke above; sickness, vacation.

Q. An employee quitting?

A. An employee quitting, holiday.

Q. Holidays. That's true. In the grocery busines, I presume you stay open during most (p.27) holidays?

A. Yes.

Q. And Delchamps, does it close for any holidays?

A. Christmas, Thanksgiving in the past. It's based on each year, what we decide to do. Upper management makes that decision.

Q. Christmas, and what day did you say?

A. Thanksgiving.

Q. Were there certain departments in the stores in the greater Lake Charles area where the need to call upon the use of personnel from one of the other stores in the greater Lake Charles area was greater than other departments?

A. No.

Q. So this practice occurred pretty much across the board in all the departments?

(p.27)

MR. SCHWARTZ:

I'm going to object to the characterization of what Mr. Wiggins has testified to as its establishing practice.
Subject to the objection, you can answer the question.

EXAMINATION BY MR. TETE:

Q. This practice was pretty much across the board in all the departments?
(p.28)
A. Yes.

Q. In what departments is shrinkage of greater concern than other departments?

A. All of them. I can't give you one individual department. It's concerned with all of them. It's equal.

Q. I know from my bag boy days, sir, that you have a risk of greater shrinkage in certain departments as opposed to others, such as produce department, frozen foods, as opposed to can goods. Is that a fair statement?

A. No. The dollar amount is higher, based on your grocery department. Sixty-five percent (65%) of your business is in grocery.

Q. When you say grocery, you mean dry goods?

A. Dry goods.
(p.28)
Q. So, it's a concern all across the board?

A. Yes, sir.

Q. Okay. Now, to control shrinkage, would it be a fair statement to say that Delchamps, Inc. wants to assure that stores,

such as the stores in the greater Lake Charles area, do not order more goods than they're going to be able to sell?

A. Yes.

Q. Can you tell me what policies Delchamps, Inc. (p.29) has implemented in order to reduce the chance that more goods would be ordered than can be sold?

A. Order to fill your shelves.

Q. But isn't it true that in the grocery business, your ability to forsee what you're going to be able to sell is pretty much based on past experience and that past experience is not always going to provide you with a crystal ball to be able to know how much you need? Is that a fair statement?

A. Yes.

Q. So that by the very nature of the grocery business, they're going to be occurrences where more goods are ordered than can be sold?

A. Yes.

Q. And would it be a fair statement to say, sir, that sales at one store in the greater Lake Charles area may differ in (p.29) volume than at another store in the greater Lake Charles area in any given week?

A. Yes.

Q. And would it be a fair statement to say that the amount

of goods ordered by the stores in the greater Lake Charles area will vary in any given week?

A. Yes.

Q. So would it be a fair statement to say, sir, that Delchamps, Inc. would experience instances in (30)which one store in the greater Lake Charles area ordered too much goods and another store didn't order enough of that particular item?

A. Yes.

Q. And wouldn't it be a fair statement to say that on such occasions, arrangements would be made to transfer the overage at one store to the shortage of another store in the greater Lake Charles area?

A. Yes.

Q. And would there be any certain departments in which this practice would more commonly occur than others, or would it be across the board?

A. It would be across the board.

Q. Who at a grocery store in the greater Lake Charles who would be responsible for actually ordering goods?

A. The head stock clerk.

Q. Would the head stock clerk order the goods for the entire store or only for a certain department?

A. A certain department.

Q. So there would be a head stock clerk for each department in a store?

A. It'd be a department manager in each department.

Q. Is the department manager for each department, is he also the head stock clerk? (stop)
(32)
there. I don't recall the head stock clerk's name of 104. It's got a job code on here, but it's stock clerk on 106, Kenny Richard. But I'm must looking at a job code, the name doesn't ring a bell, but it does state that there was one there.

Q. Well, with the exception of the position of head stock clerk which I'm assuming from your testimony you're characterizing as — would you consider that a managerial position?

A. It would be a managerial position as well as any other ones on there, yes.

Q. With the exception of the head stock clerk position, would it be a fair statement to say that "Exhibit #2" which I'm attaching to the deposition, is a fair representation of the managerial organization of stores in the greater Lake Charles area, 104, 105, 106, in 1995?

A. Yes.

Q. Other than temporary assignments of an employee at one given store in the greater Lake Charles area at another store in the greater Lake Charles area, for the reasons you've already stated, would an additional reason be in order to pinpoint whether there was an excessive shrinkage in a given

(p.32]
store by movement of a certain employee to another for a (33)period of time, for whatever period, in order to ascertain whether that person was responsible for the excessive shrinkage?

A. Yes.

MR. SCHWARTZ:

Counsel, I was going to object to the question, because I didn't understand it.
He understands it.

A. I understand it.

EXAMINATION BY MR. TETE:

Q. And would you elaborate on the circumstance in which that would occur.

A. On occasion, we'd move one, for example, a produce manager, from one store to another based on maybe the sales were higher at one and the department manager just couldn't get a grasp of increase in sales, so we'd put him in a lower volume store to train them and develop them to bring them back up to a level without having to terminate somebody per say. Whereby putting them in a lower volume store, we could spend a little more time with them where it wasn't fast paced.

Q. That would be a temporary assignment?

A. Not necessarily.

(p.33)

Q. It could be a permanent assignment; it could be (34)a temporary assignment?

A. Yes.

Q. Okay, I take it, during the time that you were district manager of the area encompassing 104, 105 and 106, that Delchamps, Inc. would follow that policy with respect to those stores in the greater Lake Charles area?

A. Yes.

Q. Which store in the greater Lake Charles area had a greater volume during the period that you were district manager?

A. Sulphur, Louisiana, 106, from what I can remember.

Q. And next to Sulphur, which of the two (2) had the greatest volume?

A. 104 and then 105.

Q. So, if a manager in 106 was having a problem with ordering correctly, you've had instances while you were district manager where he would be moved to store 104 or 105, and presumably, the manager in that store would take the job at 106?

A. You're speaking store manager or —

Q. No. Manager of — like the produce manager or the market manager.

A. Yes.

APPENDIX K

MANAGEMENT GUIDE

EXHIBIT #1

AREA MANAGER — OPERATIONS DEPARTMENT

1. FUNCTION:

Supervises the operations of retail stores in his assigned territory in accordance with established policies and standards. Recommends changes in policy or procedures as circumstances warrant.

2. RESPONSIBILITY AND AUTHORITY:

A. *Area of Responsibility*

(1) Operation of Retail Stores
   (a) Maintain stores according to standards
   (b) Carry out sales plans
   (c) Expense control
   (d) Shrinkage control
   (e) Development of people

B. *Organization of Territory:*

(1) Determine manpower requirements necessary to carry out his responsibilities.
(2) Recommends changes in manpower requirements as circumstances may require.

C. *Responsibility for Personnal:*

(1) Maintains the work force.
(2) Guides subordinates in their development.
(3) Evaluates performance of subordinates and takes appropriate action to improve performance. (Discharge action subject to prior approval.)

D. *Cost Control:*

(1) Reviews all operational expenses in his territories and recommends corrective action.

(2) Checks utilizations of time equipment and materials. Follow up to eliminate waste.

(3) Recommends, for approval, any unusual expenditure deemed necessary.

3. RELATIONSHIPS:

a. *Reports to:* Zone Manager, Supermarket Operations

b. *Supervises:* Store Managers

c. *Other Relationships:*

(1) *Technical Specialist*

Request Zone Manager for assistance of technical specialist to help solve technical problems. Exchanges information during period of assignment.

(2) *Other Departments:*

Exchanges information with other departments, on matters concerning their area of specialization, as authorized by the Zone Manager.

(3) Maintains friendly relationships with government or other agencies, who contact him incident to the performance of his job.

EXHIBIT #2

MANAGERIAL ORGANIZATIONAL CHART

Delchamps Stores 104-105-106 Lake Charles, Sulphur

District Manager
104-105-106
WAYNE WIGGINS

Store Manager
104-105-106
BRYAN BRADLEY

Delchamps Store #104 4431 Nelson Rd. Lake Charles, LA 70606	Delchamps Store #105 3240 Hwy 14 Lake Charles, LA 70605	Delchamps Store #106 2227 Maplewood Dr. Sulphur, LA 70663

Asst. Manager Everett P. Marshall, III	**Asst. Manager** Randall G. Martens	**Asst. Manager** Carl Fontenette
Asst. Manager Michael J. Pierce.	**Asst. Manager** Charles D. McVey	**Asst. Manager** Michael J. Trahan
Mark. Manager Julius Courville, Jr.	**Mark.Manager** Wesley A. Schirmer	**Mark.Manager** Kenneth R. Cole
Pro. Manager Donald J. Fontenot	**Pro. Manager** Vickie H. Pousson	**Pro. Manager** Steven P. Johnson
Deli/Bak.Mgr. Angelia F. Romero	**Deli/Bak.Mgr.** Dina E. Lopez	**Deli/Bak.Mgr.** Nancy S. Bimle
Head Cashier Dabrina D. Cole	**Head Cashier** Gail L. Reimer	**Head Cashier** Tabetha A. Stutes

DELCHAMPS, INC. - STORE DIRECTORY

PR1390
TIME 7.37.53

As of 03/02/95

AREA	AREA NAME	AREA MANAGER	STORES
01	AREA I	Ricky Carrell	2,3,4,5,7,8,12,13,14,17,19,20,21,22,23,25,26, 27,28,29,31,32,33,54,112,302,303
02	AREA II	Kevin Burckhardt	6,10,11,15,16,18,34,35,36,37,38,39,46,51, 306,307
03	AREA III	Earl Cartwright	40,41,42,43,44,45,47,48,50,53,56,57,58,59, 212,240,242,243,244,245,247,249,250,253, 256,257,301,340
04	AREA IV	Rick Locke	9,24,55,60,62,64,67,68,69,74,78,80,82,111, 120,122,124,360,362,363,364,365

DELCHAMPS, INC. - STORE DIRECTORY

PR1390
TIME 7.37.53

As of 03/02/95

(continued) Page 9

AREA	AREA NAME	AREA MANAGER	STORES
05	AREA V	Johnny Smith	70,71,72,73,77,81,83,89,90,91,93,94,98,99,100, 103,116,118,121,127,128
06	AREA VI	Wayne Wiggins	86,88,92,96,97,101,102,104,105,106,107, 108,109,110,113,114,115,123,125,126
07	AREA VII	H. Van Hooser	305

APPENDIX L

Exhibit D-17

WE'VE GOT SOMETHING THAT'S MAKING ALL OTHER FOOD STORES SEE RED.

EVERYDAY
MINIMUM PRICING
ABSOLUTELY LOWER PRICING!

It's working. Delchamps customers all over this area are already discovering they have the minimum total food bill every week. That's because the New Delchamps doesn't have weekly specials that keep your total food bill high.

Instead, we have Everyday Minimum Pricing, which gives you absolutely lower pricing on every item, every day. Our shoppers like our way of doing business so much, some or our competitors are seeing red. Maybe someday they'll see the light.

THE NEW Delchamps Super Stores

We're going to change your mind about how to save on food. 24 hours everyday.

Hwy. 14	4431 Nelson	2227 Maple.
Prien Lk. Rd.	Road	Drive
Oak Park Sq.	Country Club	Maplewood
	Plaza	Plaza/Sulphur

EXHIBIT M

EDMONDSON REPORTING & VIDEO

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

ROBBIE A. VIATOR; PAMELA S. BARBRY; DONNIE R. HARMON, individually and on behalf of all persons similarly-situated,	)	
Plaintiffs,	)	Civil Action No.:
vs.	)	CV 95-0797
DELCHAMPS, INCORPORATED	)	
Defendant.	)	

DEPOSITION OF BRYAN M. BRADLEY

EXHIBIT F

(10)
A. Correct.

Q. But all three stores opened in about the same time frame of within a year of each other; is that correct?

A. 104 opened sometime in '84; 106 was before the holidays; and 105 was after the new year.

Q. 106 was after the Thanksgiving holidays you're talking about?

A. I don't recall exactly.

Q. So the three stores opened within a matter of months of one another?

A. Yes.

Q. And you say it was only a couple of months before you were moved into a managerial-type position; is that correct?

A. Correct.

Q. Now, Delchamps has previously provided some information which indicates that you've worked at Store 106, Store 105, and Store 104, all in the Greater Lake Charles area; is that correct?

A. Correct.

Q. The question I want to ask you, Mr. Bradley, if you know the answer, is why were you (stop)
(16)
A. I transferred to 106 on2/17. This second date is correct, but it shows me goine to 105, and that's incorrect.

MR. TETE: Let's go off record a second.
(Discussion held off the record.)

Q. (BY MR. TETE) Let's look then, once again, at Exhibit No. 1, and I believe your testimony had been that it correctly shows the date that you started as being December 17, 1984.

But you're stating that you started at Store 104, and so this incorrectly lists you as working at Store 106?

A. Yes.

Q. How long did you work at Store No. 104 before you—

A. To this date.

Q. And let the record reflect you're pointing to February 17 of '85, correct?

A. Yes.

Q. At that time, you transferred to what store?

A. 106 from 104.

Q. So you worked just a couple of months at (17)104 before you moved to 106?

A. Do you have the date that 105 opened?

Q. No.

A. Okay.

Q. You stated after the new year.

A. I believe it was February 17 or approximately there that 105 opened. So this date would be the date that I did go to 105.

Q. So the error in the answers is that it shows you originally working at Store 106; whereas, your testimony is you originally worked at Store 104?

A. Correct.

Q. So you worked at Store 104 a couple of months before you were moved to Store 105?

A. Correct.

Q. And again, Store 105 is the store located—

A. Highway 14.

Q. Okay. What was the reason that you were moved after only a couple of months?

A. I was hired at 104 as a meat cutter, and when they opened 106, I went there for grand opening.

Q. You mean 105?
(18)
A. No. I went to 106 after 104.

Q. So in the two months—in the first two months that you worked for Delchamps, what you're basically telling me is you worked at all three of the stores in the Greater Lake Charles area?

A. Correct.

Q. First, at Store No. 104, which is on Nelson Road, correct?

A. Yes.

Q. And then you moven to 106, which is in the Sulphur area?

A. Correct.

Q. And then you moven to Store No. 105, which is the one on Highway 14?

A. Correct.

Q. And then according to these answers, am I correct that it was just over a month, and you were once again moved and this time to Store 106?

A. From 105, yes.

Q. So in the first four months of employment, you had transferred three times; is that correct?

A. Yes.
(19)
Q. Now, was the reason for these transfers so that you were placed where your employer believed the employer needed you?

A. Correct.

Q. How long did you hold the position as manager in the meat market?

A. Approximately two years, I believe.

Q. According to these answers, you were transferred, once again, to Store 104 in April of 1986; is that correct?

A. I don't really remember the date that I was transferred back to 104; I know I was.

Q. Sometime in 1986?

A. I don't even remember the year.

Q. Whenever you were transferred back to Store 104 once again, what was the reason for that transfer?

A. As per company needs.

Q. Was it common practice in your years of employment with Delchamps in the Greater Lake Charles area for employees to be transferred indefinitely—not a temporary transfer, just indefinite transfers—to other stores in the Greater Lake (20)Charles area?

A. I have seen that done.

Q. Can you tell me whether it is more common for such transfers of employees in the Greater Lake Charles area amongst stores in that area to occur in certain departments or at a manageral level as opposed to hourly employee-type positions?

A. Would a salaried person be more likely to be transferred that an hourly person?

Q. Yes.

A. I don't think that would necessarily be true.

Q. So when you state that you have seen transfers occur among employees in the Greater Lake Charles area, you're not limiting that answer to persons; such as, yourself, that held managerial positions, correct?

A. It could be anybody.

Q. you stated that you held that position of market manager for about two years.

What position were you promoted to after that time?

A. Assistant store manager.
(22)
A. Shrink would be the loss of what you bought compared to what you sold.

Q. Thank you.

Now, let met show you an advertisement that I'm going to mark as exhibit No. 2 from Lake Charles American Press, dated January 28, 1987.

(Plaintiff's Exhibit No. 2 marked for identification.)
(A copy is attached.)

MR. TETE: Let me show you first. I copied some additional pages to satisfy your need for a date.

(Witness examines document)

Q. (BY MR. TETE) Now, this ad is touting the freshness of Delchamp's produce; is that a fair characterization?

A. Correct.

Q. And in it, it has a comment, "It's so fresh, it glistens. If it didn't, out it would go. Because it's my job to see that you get only the best produce."

Now, this comment, "It's so fresh it glistens. If it didn't, out it would go," is what(stop)
(28)
the need for the documentation that would be necessary if you did not anticipate having that product returned in kind?

A. That would be correct.

Q. Am I correct that both practices did, in fact, occur over the years that you were employed in the Greater Lake Charles area; that, namely, where there transfers of product with anticipation of product being returned in kind and transfers of product where you did not anticipate product being returned in kind?

A. I've seen it happen both ways.

Q. Now, would it be a fair statement to say that the person in charge of each department in a Delchamps store would be the person most involved in such transfers?

A. Either thhe department head or manager on duty

Q. A department head could make such a trnasfer on his own authority?

A. He would probably confer with the store manager—her or she.

Q. But the ultimate decision would rest(stop)
(39)
A. Many times he was asked?

Q. Yes. To run to Lake Charles 104 and 105 to pick up stock items; such as, icing, produce, milk, and canned goods.

A. He was probably asked on occasion, but, mostly, when we did transfers, we would take volunteers, which most everybody wanted to volunteer to have a few minutes to go pick something up to be out of the store, just to get away for a few minutes.

He was probably asked or volunteered. I don't know how many of which.

Q. Now, at some point, you became manager of all three stores in the Greater Lake Charles area; is that correct?

A. Correct.

Q. When did you become store manager of all three stores in the Greater Lake Charles area?

A. I don't recall the exact date, but I'm going to guess November.

Q. Was it before Thanksgiving?

A. I don't know.

Q. Your best guess, it was in November of 1994?[stop] (p.60)

A. I don't believe anybody had asked me to sign anything about this case to my knowledge.

Q. (BY MR. TETE) Am I correct, Mr. Bradley, that all three of those stores in the Greater Lake Charles area opened at about the same time, and they all closed at the same time?

A. I believe they all closed the same day and opened different days, different months, all within a six-month period.

Q. And am I correct that throughout the years that you worked for Delchamps in the Greater Lake Charles area, you worked on different days at different stores?

A. During the same week?

Q. Answer it however you want.

A. Say it again?

Q. Am I correct that throughout years—well, let me strike that.

Am I correct that throughout the years you worked for Delchamps in the Greater Lake Charles area you were called upon to work at each of the stores in the Greater Lake Charles area?

A. At one time or another, I worked at all(61) three.

Q. That was according to company need?

A. Correct.

Q. And am I correct that, because you worked at all three stores in the Greater Lake Charles area, you got to know the people that worked in each of those stores?

A. Yes, I knew everybody.

Q And am I correct that, in fact, you ended up working with employees at one store in the Greater Lake Charles area that you had previously worked with those same employees at another store in the Greater Lake Charles area?

A. Yes, I believe I did.

MR. TETE: Give us two minutes. We might be through.

(Discussion held off the record.)

Q. (BY MR. TETE(The temporary transfers of employees included managerial positions, correct?

A. I would say all.

Q. Do you know whether in the last seven months of Delchamps' operations in the Greater Lake Charles area whether any managers or managerial(62) positions in the Greater Lake Charles area—strike that.

Do you know whether any persons holding managerial positions in the Greater Lake Charles area worked at more than one store in the Greater Lake Charles area in the last seven months or operations?

A. Other than myself?

Q. Other than yourself.

A. Did any other salaried managers or managers, period, work at any other stores?

Q. In the Greater Lake Charles area and I'm just talking about the last seven months?

A. In a permanent or temporary basis?

Q. Temporary basis.

A. I don't recall right offhand.

Q. Let me ask you this. You still work for Delchamps; is that correct?

A. Correct.

Q. What position do you presently hold?

A. Store manager.

Q. That's here in Tuscaloosa, Alabama?

A. Yes.

Q. Since leaving the Greater Lake Charles(stop)

EXHIBIT N

Exhibit O

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

BOBBIE A. VIATOR, ET AL	*	
	*	
Plaintiffs,	*	CIVIL ACTION
	*	
VERSUS	*	NO. 95-0797
	*	
DELCHAMPS, INC.	*	JUDGE TRIMBLE
	*	
Defendant.	*	MAGISTRATE
	*	JUDGE WILSON
* * * * * * * * * * * *		

AFFIDAVIT OF DINA LOPEZ

STATE OF LOUISIANA

PARISH OF CALCASIEU

BECAUSE ME, the undersigned Notary Public, personally came and appeared, DINA LOPEZ, who, after being duly sworn did depose and state:

1.

Affiant is a party in the above captioned case.

2.

This affidavit is based upon Affiant's own personal knowledge.

3.

I worked as a deli/bakery clerk for Delchamps from January of 1986 until October of 1993 and after that time worked as deli/bakery manager until Delchamps closed in February of 1995.

4.

Although I was working primarily at Store No. 104, at the end of 1987 or beginning of 1988, I went to Store No. 105 to help for two to four weeks, maybe longer, because that were shorthanded. In 1992, I went to Store No. 106 while their manager was cut. In 1993, I went to Store No. 105 to help because they were shorthanded.

5.

While working at Store No. 104, I transferred stock to 105 and 106, and also received stock from 105 and 106. We transferred stock when the store would run out or would not receive items. We called the others, Store 105 and 106 to help us out. Also, the produce and meat department and grocery department transferred merchandise. Sometimes, they would ask me to bring items to other stores. When they did it was such items as cases, boxes, buckets, etc.

6.

I do remember them transferring floor equipment.

7.

Also, when we had out yearly meeting, all stores in the greater Lake Charles area would have it together in one place at the same time. When we had our last meeting, the time they said we were closing, we had one big meeting together at the same time with Bryan Bradley who was store manager for all three stores at the same time.

/s/ Dina Lopez

DINA LOPEZ

THUS DONE AND SIGNED on this 22nd day of April, 1996, before me, Notary Public, in Lake Charles, Louisiana.

/s/ Leticia Welch

NOTARY PUBLIC

APPENDIX O

UNITED STATES DITRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

ROBBIE A. VIATOR, PAMELA S. BARBRY, DONIE R. HARMON, Individually and on Behalf of All Persons Similarly Situated	:	CIVIL ACTION, NO. 95-0797 JUDGE TRIMBLE
VERSUS	:	MAGISTRATE JUDGE WILSON
DELCHAMPS, INC.	:	

AFFIDAVIT OF KARLA B VIATOR

STATE OF LOUISIANA
PARISH OF CALCASIEU

BEFORE ME, the undersigned authority, personally came and appeared KARLA B. VIATOR, who, upon being duly sworn, deposed and said as follows:

PLAINTIFF'S
EXHIBIT
P6
All State Legal
Supply Co.

1.

She is the spouse of Robbie A. Viator, a plaintiff in the above captioned case.

2.

She has personal knowledge of the facts set forth in this affidavit.

3.

On August 31, 1995, she plotted the road miles between the former Delchamps, Inc. stores located in greater Lake Charles area in Louisiana, using her personal vehicle, and the results of said plotting are as follows:

From Store # and Location	To Store # and Location	Road Mileage
#105 Highway 14 - L.C.)	#104 Nelson Rd. L.C.)	5.4 (via 1-210)
#104 (Nelson Rd. - L.C.)	#106 (Maplewood Dr. - Sul.)	9.4 (via 1-210
#105 Highway 14 - L.C.)	#106 (Maplewood Dr. - Sul.)	12.0 (via I-210)
#106 (Maplewood Dr. - Sul)	#105 (Highway 14 - L.C.)	14.0 (via I-10 & Hwy. 14)

On January 18, 1996, she contacted the Clerk of Court offices for the 14th Judicial District Court, Calcasieu Parish, Louisiana, and the United States District Court, Western District of Louisiana, Lake Charles Division, and was advised that no suits (other than the above captioned suit) have been filed against Delchamps, Inc. in the years 1995 and 1996 in these courts concerning the same or similar facts or circumstances made the subject of the above captioned suit and that no suits whatsoever (other than the above captioned suit) have been filed against Delchamps, Inc. in the years 1995 and 1996 in these couts.

/s/ Karla B. Viator
KARLA B. VIATOR

SWORN TO AND SUBSCRIBED before me this 18th day of January, 1996, at Lake Charles, Louisiana.

/s/ Illegible
NOTARY PUBLIC

No. 97-86

AUG 13 1997

In The

Supreme Court of the United States

October Term, 1996

ROBBIE VIATOR, DONIE R. HARMON, PAMELA S. BARBRY, RICHARD D. KEITH, PATRICIA DOUGLAS, ANGELA ROMERO, DONALD FONTENOT, GERALD LEE, ODELIA LOUISE TATE, DINA LOPEZ, NANCY H. BIMLE, MICHAEL JOSEPH TRAHAN, ANGELA R. LOPEZ, STEVEN PAUL JOHNSON, EVERETT PAUL MARSHALL, GARY CHESTER, KEVIN B. MATTE, CYNTHIA L. ROUGEAU, DAVID LEE PATTON, BRADLEY FONTENOT, TRACY BARNES, FRANK BERLIN, AND KATHLEEN CRICH Individually and on behalf of all persons similarly situated,

Petitioners,

vs.

DELCHAMPS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JEFFREY A. SCHWARTZ
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Lutz Appellate Services, inc.

RESTATEMENT OF QUESTION PRESENTED FOR REVIEW BY PETITIONERS

Did the United States Court of Appeals for the Fifth Circuit in affirming a summary judgment granted in Respondent's favor, reasonably interpret the Worker's Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.* and the Department of Labor's regulations, 20 C.F.R. § 639, *et seq.*

STATEMENT OF INTERESTED PERSONS

Delchamps, Inc. has no parent company or subsidiary companies.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

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20 C.F.R. § 639.3(i)(3)	7
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Respondent requests that the Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit reported at __ F.3d __, 12 Indiv. Empl. Rights Cas. (BNA) 1242 (5th Cir. 1997). That opinion is reproduced at A-23 of the Appendix 1 and is herein referred to as the Court of Appeals opinion or decision. The district court opinions are unpublished and are reproduced at App. A-4 and A-16.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

Petitioners were employed at grocery stores owned and operated by Respondent in the Lake Charles, Louisiana metropolitan area (store nos. 104, 105 and 106). On May 4, 1995, Petitioners filed this lawsuit alleging that Respondent violated the Worker's Adjustment Retraining and Notification Act, 29 U.S.C. § 2101, *et seq.* ("WARN") when it closed those grocery stores.

On August 16, 1995, Respondent filed its Answer denying liability. On February 22, 1996, the district court heard the Petitioners' Motion to Certify Action as a Class Action and on that date issued an Order requiring the parties to submit memoranda on the issue of whether the three closed stores "should be considered as a 'single site' under the WARN Act." App. at A-1.

Pursuant to the district court's February 22, 1996 Order, the Petitioners filed their Memorandum in Support of a Summary Judgment. Respondent filed its Memorandum in Support of a Summary Judgment with the court on May 6, 1996. On July 1, 1996, the Magistrate Judge issued a Report and Recommendation granting a summary judgment in Respondent's

favor. App. at A-4. On July 22, 1996, the Petitioners filed objections to the Magistrate Judge's Report and Recommendation. On July 31, 1996, Respondent filed its response to the Petitioners' objections. On August 13, 1996, the district court issued its decision adopting the Report and Recommendation and dismissing Petitioners' lawsuit with prejudice. App. at A-16.

On August 26, 1996, the Petitioners filed a Notice of Appeal and on April 15, 1997, the United States Court of Appeals for the Fifth Circuit issued its decision affirming the district court's decision to grant a summary judgment in Respondent's favor.

B. Statement of the Facts.

In October, 1994, as a result of declining sales and profits, Respondent's management made a preliminary decision to close twelve to fourteen of its unprofitable stores. R. at 214. On February 14, 1995, Respondent announced its intent to close store nos. 104, 105, 106 on February 28, 1995. Respondent maintains that the Court of Appeals properly found that Petitioners failed to sustain their burden of establishing facts which would support their contention that the three closed stores should be considered a "single site" of employment under WARN. App. at A-32. Accordingly, Respondent requests that the Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION.

The Court of Appeals decision was a plainly correct application of settled law, and no conflict among the circuits is even alleged.[1] In addition, this case does not involve an important question of law nor does the Court of Appeals decision conflict with applicable decisions of the Court.

II.

THE COURT OF APPEALS DECISION WAS A PROPER APPLICATION OF WARN'S LIMITATIONS AS TO WHEN SEPARATE SITES MAY BE CONSIDERED A SINGLE SITE OF EMPLOYMENT.

The issue before the courts below was whether Respondent violated the Workers Adjustment and Retraining Act, 29 U.S.C. § 2101, *et seq.* ("WARN") because Respondent did not provide employees working at store nos. 104, 105 and 106 with sixty days notice of its intent to close those stores before closing them in February, 1995. Respondent has maintained that notice was not necessary because each store was a "single site of employment" as that term has been defined and interpreted by

---

1. Indeed, Petitioners acknowledged that in addition to the Fifth Circuit, the United States Court of Appeals for the Eighth and Eleventh Circuits have issued decisions based upon the same principles enunciated by the court below. *See Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277 (8th Cir. 1996); *International Union, UMW v. Jim Walter Resources*, 6 F.3d 722 (11th Cir. 1993). In addition, while not noted in Petitioners' Brief, the Tenth Circuit has also held similarly. *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, __ U.S. __, 116 S. Ct. 1588, 134 L. Ed. 2d 685 (1996).

legislative, regulatory and jurisprudential authorities and none of the stores employed the fifty employee minimum required to trigger WARN.

Because WARN does not define "single site of employment," courts including the courts below have looked to the DOL regulations and in some cases the "the legislative history" to determine the meaning of that phrase. *Blum v. Stenson*, 465 U.S. 886, 896, 104 S. Ct. 1541, 1548, 79 L. Ed. 2d 891, 900 (1984) and App. at A-12-14, 27, 28.

The legislative history of the statute shows that Congress sought a narrow definition of an employment site:

> The Conference Agreement strikes all references to "place of employment" and replaces them with "single site of employment." This change is intended to clarify that geographically separate operations are not to be combined when determining whether the employment threshold for triggering the notice requirement is met. For example, an automobile assembly plant on the east side of town and assembly plant on the west side of town ordinarily would be two separate sites of employment.

H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1046 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2078, 2079. *See also International Union, United Mine Workers v. Jim Walter Resources, Inc.*, 6 F.3d 722, 726 (11th Cir. 1993) (legislative history evidences Congress' intent to "clarify that geographically separate operations should not be combined" for triggering purposes).

In addition, the Department of Labor ("DOL") echoed Congress' intent when it promulgated its regulations implementing WARN by stating that "[t]he general rule is that separate facilities are separate sites." 54 Fed. Reg. ¶ 16,050 (April 21, 1989). Further, the DOL added that exceptions to the general rule are "narrow" and limited to cases where geographically separate sites have an "inextricable operational purpose." *Id.* at ¶ 16,049.

The applicable DOL regulations are found at 20 C.F.R. § 639.3(i) (1996) and provide as follows:

> (3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another;
>
> (4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.

The Court of Appeals decision considered the above-quoted regulations and found, based upon the record evidence, that the Petitioners did not prove or even raise a genuine issue of fact

which would have established this case as an exception to the "general rule that separate facilities are separate sites."

Simply put, the court below concluded that under 20 C.F.R. § 639.3(i), a party seeking to establish that separate buildings or areas which are not directly connected or in immediate proximity are a single site of employment, must show: "1) the separate facilities are in 'reasonable geographic proximity' of one another; 2) they are 'used for the same purpose'; 3) and they share the same staff and equipment." App. at A-29.

The court below held that the summary judgment evidence failed to show that the three stores shared the same staff and equipment. Thus, the Court of Appeals held that Petitioners had not stated a claim under WARN. The Petitioners are not challenging the Court of Appeals' holding that the three stores did not share the same staff and equipment. Rather, the Petitioners contended that the Court of Appeals' interpretation of what Petitioners labeled "ambiguous" DOL regulations (*i.e.*, requiring a showing that separate buildings share the same staff and equipment to be considered a single site of employment under WARN) conflicts with the Court's requirement that courts give controlling weight to agency regulations. Petitioners' Brief at p. 6 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).

The Petitioners' argument is contradictory. On the one hand, Petitioners criticized the Court of Appeals for failing to properly defer to the DOL regulations. On the other hand, Petitioners argued that those very same regulations are "ambiguous." Petitioners' Brief at p. 6. Thus, it seems that rather than having the courts, including this one, reasonably interpret the regulations, that, instead, Petitioners want the Court to re-write the legislation. No cite is necessary regarding the Court's constitutional mandate in that regard.

Of course, Respondent maintains that the regulations are not ambiguous and that even if the Court disagrees, that the Court of Appeals properly interpreted the relevant portions of the DOL's regulations. Further, even if the Court determined that the Court of Appeals misinterpreted the regulations, Respondent would maintain that the court below's interpretation was reasonable and not, as Petitioner contended, done in a manner that is at odds with decisions of this Court.

20 C.F.R. § 639.3(i)(3) sets forth the criteria under which separate sites may be combined and considered a single site. Petitioners have argued throughout the course of this litigation that a showing of common operational purpose, irrespective of whether separate sites share staff and equipment should have lead to a holding that the three stores were a single site of employment, or, at minimum, that there existed disputed issues of fact regarding the issue. To support this conclusion, Petitioners relied heavily on 20 C.F.R. § 639.3(i)(4) which states that separate sites cannot be combined if they do not share the same staff or operational purpose.

Petitioners maintained that the court below did not reasonably interpret the regulations because they contended that 20 C.F.R. § 639.3(i)(4) should be read as an affirmative clause mandating that the Court hold that separate sites should be combined if they share the same operational purpose. Petitioners' argument is off base for several reasons.

First, their broad interpretation of the DOL's regulations runs afoul of both Congress' and the DOL's statements desiring a very narrow reading of when geographically separate sites of employment should be combined for purposes of triggering WARN's notice requirements. As stated above, Congress demonstrated its intent to narrow the statute's definition of an employment site by striking references to "place of employment"

and replacing them with "single site of employment" noting further that "[t]his change is intended to clarify that geographically separate operations are not to be combined when determining whether the employment threshold for triggering the notice requirement is met." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1046 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2078, 2079. *See also International Union, United Mine Workers v. Jim Walter Resources, Inc., supra*, 6 F.3d at 726.

In addition, as noted above, the DOL made its intent clear when it promulgated its regulations implementing WARN by stating that "[t]he general rule is that separate facilities are separate sites" and that exceptions to the general rule are "narrow" and limited to cases where geographically separate sites have an "inextricable operational purpose." 54 Fed. Reg. ¶¶ 16,049 and 16,050 (April 21, 1989). Accordingly, Petitioners' expansive interpretation of 20 C.F.R. § 639(i)(4) is directly contrary to Congress' and the DOL's statements of intent regarding WARN, and, therefore, it should be rejected by this Court.

Also, Petitioners' reading of the regulations would render 20 C.F.R. § 639.1(a)(3) moot. That subsection sets forth the criteria necessary for a finding of when separate sites may be combined for purposes of WARN, *i.e.*, when the sites share the same staff and equipment *and* the same operational purpose. Given Congress' and the DOL's declarations of their intent to limit aggregating separate sites of employment under WARN and the fact that nowhere in the regulations does the DOL state, as Petitioners would hope, that shared operational purpose alone will sustain a finding of combining separate non-contiguous work sites, the latter subsection should be read merely as a clarification of the preceding subsection.

Indeed, Petitioners' analysis is inconsistent with the example the DOL provided in 20 C.F.R. § 639.1(a)(4), the subsection upon which Petitioners' petition is based. There, the DOL stated "[f]or example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers." It is difficult to understand how Petitioners can argue that the court below failed to reasonably interpret the DOL regulations when the regulations state in no uncertain terms that separate sites that employ different workers are to be considered separate sites under WARN.

Not only was the court below's interpretation of WARN's regulations reasonable, but it was correct and logical. In fact, its interpretation is consistent with the three other circuit courts that have addressed this issue. *See International Union, United Mine Workers v. Jim Walter Resources, Inc.*, *supra*, 6 F.3d at 722; *Frymire v. Ampex Corp.*, *supra*, 61 F.3d at 767 (although two plants were only 150 feet apart and there were was some unity and common design, they were single sites of employment under WARN because the plants had separate management, employees and they produced distinct products); *Rifkin v. McDonnell Douglas Corp*, *supra*, 78 F.3d at 1281 (court held that two locations eleven and one-half miles apart did not constitute a single site of employment because occasional transfer of employees and equipment, centralized human resource functions and allegations of similarly produced goods were insufficient to establish necessary connection between locations); *see also Hooper v. Polychrome, Inc.*, 916 F. Supp. 1111 (D. Kan. 1996) (court held that two locations twenty-seven miles apart were not a single site of employment because the evidence failed to show that the operations shared staff, equipment and operational purpose).

In *Jim Walter Resources* the court found:

> The common thread in determining what is a single site would appear to be a sufficient degree of geographic contiguity as well as an operational connection. Several buildings which are part of a "campus" would be an obvious example. On the other hand, geographically separate buildings (i.e., several blocks or miles apart) would not appear to constitute a single site unless they were part of a single operation. An example of such an exception might be two warehouses several blocks apart sharing the same equipment.

6 F.3d at 725, citing Department of Labor discussion paper 9A Ind. Empl. Rights Man. (BNA) 595:954 (1988). The court held that the mines should not be combined because the employees did not regularly rotate among sites (although many employees had worked at more than one mine during their employment); and the mines had separate management, parking lots and offices. *Id.* at 726.

The holdings in the above-cited cases support Respondent's position that the court below reasonably interpreted the DOL's regulations when it held that separate sites of employment should not be combined under WARN if those sites do not share staff and equipment. Accordingly, Respondent requests that the Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit reported at __ F.3d __, 12 Indiv. Empl. Rights Cas. (BNA) 1242 (5th Cir. 1997).

CONCLUSION

Petitioners have failed to state any reason why the Court should review the Court of Appeals decision. It is evident that there is no conflict among the circuits. In addition, there is no support for Petitioners' contention that this case involves an important question of federal law that should be settled by the Court or that the Court of Appeals decision conflicts with applicable decisions of the Court. As such, Respondent requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

JEFFREY A. SCHWARTZ
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